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No. 85-5534

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM "BILLY" MITCHELL,

Petitioner

-Against-

RALPH KEMP, Superintendent,
Georgia Diagnostic &
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. SHOULD THE COURT GRANT CERTIORARI TO DETERMINE WHETHER, UNDER STRICKLAND V. WASHINGTON, A CAPITAL DEFENDANT IS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILS -- WITHOUT JUSTIFICATION -- TO INVESTIGATE OR PRESENT AT HIS SENTENCING TRIAL ANY OF THE AMPLE AND POWERFUL MITIGATION EVIDENCE THAT WAS READILY AVAILABLE?

II. SHOULD THE COURT GRANT CERTIORARI TO DETERMINE WHETHER A DEATH VERDICT MAY REST, EVEN IN PART, ON AN UNCONSTITUTIONALLY COERCED CONFESSION?

III. SHOULD THE COURT GRANT CERTIORARI TO DETERMINE WHETHER A CAPITAL INMATE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS EIGHTH AMENDMENT CLAIM THAT THE GEORGIA DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER?

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No. 85-_____

IN THE

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WILLIAM "BILLY" MITCHELL,

Petitioner

-Against-

RALPH KEMP, Superintendant,
Georgia Diagnostic &
Classification Center,

Respondent

Petitioner William "Billy" Mitchell respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case, which is officially reported at 762 F2d 886 (11th Cir. 1985), is annexed as Appendix A.

The opinions of the United States District Court for the Southern District of Georgia in this case, which are officially reported at 538 F.Supp. 77 and 564 F.Supp. 780, are attached as Appendices B and C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1985. A timely Motion for Rehearing was denied on July 11, 1985. A copy of the Order denying rehearing is

annexed as Appendix D. By order dated September 11, 1985, the Circuit Court stayed its mandate until October 1, 1985. A copy of that Order is annexed as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

A. Ineffective Assistance of Counsel

Clarence A. Miller was appointed by the Worth County Superior Court to represent Billy Mitchell, on August 12, 1974. Under the applicable Georgia statute, Mr. Miller received $150 for the entire representation. (R-I at 104.)

During the period of almost three months between his appointment and Petitioner's trial, Mr. Miller's representation of his capitally charged client consisted, at most, of the following actions: (1) he attended a line-up conducted on August 12, 1974; (R-V at 4)[1/] (2) he talked with some, but not all, of the officers who had interrogated Petitioner, and viewed the real evidence (two pistols) in their possession; (R-V at 6) (3) he talked briefly with his client "four or five" times;[2/] (4) He talked with his client's

---

1/ References to the Original Record in the district court are indicated by "R" followed by the volume and page numbers. References to depositions made part of the district court record are indicated by the name or initial of the deponent. References to affidavits which will be certified for transmittal to this Court are identified by name of affiant.

2/ The record clearly contradicts the circuit court's statement that counsel discussed the case "in detail" with Petitioner. In the first conversation, before the lineup, Mr.
(Footnote Continued)

father twice by telephone, discusing only whether the family could pay fees or retain other counsel (R-V at 26.),[3/] and (5) he met briefly with an attorney sent by the Mitchell family from Jacksonville, Florida, again discussing only the possibility of shifting responsibility for the case to a privately retained attorney. (R-V at 24.) Mr. Miller's "entire file" of papers from the case consisted of three sheets of paper -- two sheets containing his notes from the line-up and the third containing a few sentences from one of his conversations with his client. (R-V at 2-5.)

On November 5, 1974, Petitioner William "Billy" Mitchell pleaded guilty to the murder of Christopher Carr. Four hours later, the trial court commenced Petitioner's sentencing hearing. The state introduced documentary evidence and testimony from several witnesses, including emotional testimony from the victim's mother, to prove various aggravating circumstances. Billy Mitchell's attorney called no witnesses and presented no mitigating evidence. Mr. Mitchell did not testify in his own behalf. (R-I at 265.) Having heard nothing positive about Billy Mitchell, the court sentenced him to die. (R-I at 266.)

(Footnote Continued)
Miller simply advised Petitioner not to speak to anyone. (R-V at 25-26) In the second, Mr. Miller merely raised the question whether Petitioner would prefer retained counsel. (C.M. Depo. 39040; R-V at 24-25) At a third, Mr. Miller filled out a bare fact sheet noting his client's address, date of birth, and schools, and that, in Miller's view, Petitioner had no mental or physical handicaps. (R-V at 4) The last conversation with Petitioner that Mr. Miller could identify took place during the short break between Petitioner's guilty plea and presentence hearing. (R-V at 32, 33, 47, 48)

[3/] The senior Mr. Mitchell flatly denies that Mr. Miller ever spoke to him about <u>any</u> subject. (W. Mitchell Aff., ¶ 14.) And thre is <u>no evidence</u> in the record to support the circuit court's apparent assumption that counsel asked Petitioner's father about anything other than attorney's fees.

Counsel failed to present any mitigating evidence because he conducted no pretrial investigation into such evidence. Counsel knew that Petitioner had numerous relatives both in nearby Folkston, Georgia and in his home town of Jacksonville, Florida. (R-V at 12, 20-21, 23-24) Moreover, counsel spoke by telephone with Petitioner's father at least twice, met with an attorney sent by the Mitchell family to see him and knew that members of the family visited his client regularly in jail. In fact, Billy Mitchell's mother, father and sister sat quietly at Petitioner's sentencing hearing, while Mr. Miller rested without presenting any evidence on his client's behalf (W. Mitchell Aff. ¶ 10; G. J. Mitchell Aff. ¶ O; J. Mitchell Aff. ¶¶ n-o). Mr. Miller failed to take advantage of any of those opportunities to develop mitigating evidence (R-V at 24-25, 58)

Had Mr. Miller made any effort to find mitigating evidence, he would have been able to paint for the sentencing court a very different picture of Billy Mitchell than the one painted by the prosecutor's brush. The affidavits and testimony of Billy Mitchell's family and neighbors -- all of whom would gladly have testified in his behalf in 1974 -- fill 170 pages of the district court record. In addition to his family, these witnesses include a Jacksonville City Councilman, a former prosecutor and professor of business law, a professional football player, a bank vice-president, as well as several of Mr. Mitchell's teachers, coaches and friends. To demonstrate the extraordinary power of the case in mitigation that was available to Petitioner's counsel, we quote extensively from those affidavits below. Petitioner will also have certified that portion of the record containing

those affidavits. We strongly urge the Court to read those affidavits in their entirety.

Had trial counsel searched for mitigating evidence, he could have informed the sentencing court that Billy Mitchell grew up in "the most poverty-stricken and crime-ridden section of Jacksonville, Florida," which was so notorious that "cab drivers routinely refused to enter it and municipal bus service was eventually discontinued there." (Haney Aff., ¶ 10.) Even in that neighborhood, the Mitchells were considered "especially poor." Billy shared one bedroom with his six brothers (Id., § 11.), and was often teased by other students because of the kind of clothes he had to wear. (Id., ¶ 22.)

Yet, despite those surroundings, Billy Mitchell was widely known in his community as a youth of impressive character and achievement. He had been captain of his school's football team (Badger Aff., ¶g), the person who led the team in prayer before each game (K. Bently Aff., ¶ e) and an above average student (Rackley Aff., ¶ g). He was active in the student council, school choir (B. Bentley Aff., ¶ d), church choir, glee club, math club and track and field team (G. Mitchell Aff., ¶¶ f-g). Billy Mitchell had been a boy scout (Jones Aff., ¶ f), captain of the patrol boys (Gafney Aff., ¶ e) and an attendant to the junior high school queen (Gray Aff., ¶f).

Dr. Solomon Badger, Billy Mitchell's former teacher and coach at Butler High School, stated:

> To understand what an exceptional person Billy Mitchell was at that time, one must understand that, while a comprehensive high school, Butler at the time was a segregated school in the middle of a very improverished area -- what might be called today a ghetto. In that locale and setting, Billy Mitchell

was a rarity because of the exceptional character he displayed at Butler.

(Badger Aff., ¶ e.)

Donald Gaffney, a professor of business law and former prosecutor, grew up with Billy Mitchell. He remembers Billy as a:

> good student -- the type of individual you would think would go on to do good things in the community.... Even though he was pretty big, I remember very well that he was actually meek and mild-tempered around his peers. He was never hot-tempered or rough -- the type of person people naturally got along with.

(Gaffney Aff., ¶ f).

Warren Jones, a member of the Jacksonville City Council who also grew up with Billy, testified that:

> there was nothing negative about [Billy Mitchell's] reputation. Even though he was big, he was not the type who went around beating up on people. Most everybody liked him and liked to spend time with him.

(Jones Aff., ¶ e). Other friends and neighbors called Billy Mitchell:

> the kind of person who was always trying to help other people, and who got along well with people.

(K. Bentley Aff., ¶ d);

> a hard worker who devoted a lot of time to school activities, especially activities involving younger kids. . . . He was the kind of person you could depend on for assistance in everything.

(Crosby Aff., ¶ d);

> [somebody who] would always try to break up any fights he saw. Billy was known as somebody who would make everybody smile -- someone who would always speak to you.

(Riley Aff., ¶ e);

> a student who had leadership qualities. He was simply a fine student and athlete.

(Meeks Aff., ¶ e).

The affidavits submitted by Billy Mitchell's family demonstrate that Petitioner was also a constant source of financial and emotional support for his parents and eleven younger brothers and sisters. Eleanor Mitchell, his sister, recalls that:

> When Billy was in high school, and my mother was working, Billy was the one who took care of us all. All of the children in the family looked up to Billy -- his friends did too. Billy got along well with everybody, and could make friends anywhere he went; it seemed as if he had more friends than his brothers and sisters put together.

(E. P. Mitchell Aff., ¶ d)

Billy Mitchell's sister Glenda Jean describes Billy in her affidavit as her "protector," her "teacher," and someone who began working in the 8th grade to help support his family. (G. J. Mitchell Aff., ¶¶ e & h.) She testified that:

> I don't think any other person, including either of my parents, has been a more important influence for good on me than Billy.
>
> * * *
>
> If he were executed, it would hurt me more than anything I can imagine. It would hurt the whole family.

(Id., ¶¶ d & n.)

The affidavits submitted below also portray a vivid picture of the path which led Billy Mitchell from model youth to confessed murderer in a few short years. Dr. Craig Haney, a psychologist, attorney, criminologist and a former consultant to the United States Department of Justice, submitted an affidavit on that subject. Dr. Haney interviewed a number of Billy Mitchell's friends and family and reviewed Mr. Mitchell's prison records and other evidence, all of which were readily available to Clarence Miller in 1974. Based on that information, Dr. Haney observed:

> in the beginning of his senior year the most important thing in Billy's life -- his family -- was placed in jeopardy.

> In September of 1969, Billy's parents argued violently over an accident that occurred in their home.... [Billy's father] was arrested, spent a short time in jail, and vowed never to return to the family home. The parents were separated and subsequently divorced.
>
> Only a few months later, and for the first time in his life, Billy got into trouble with the law (trouble which resulted in his incarceration in 1970). I do not believe these events were merely coincidental. . . .
>
> Whatever the exact connection between the break-up of his family and his subsequent involvement in criminal activity, it is clear that the events are causally related. Billy's prior record had been too exemplary and his involvement in criminal activity followed too close in time for it to be otherwise.

(Haney, Aff., ¶¶ 24-27)

At the age of 16, Billy Mitchell and two friends were arrested for attempted robbery. Although Billy Mitchell repeatedly and tearfully professed his innocence, he was convinced by his attorney and his father to plead guilty and was sentenced to a minimum prison term of six months. Billy's friends pleaded innocent and the charges against them were eventually dropped. (E.P. Mitchell Aff., ¶ h; J. Mitchell Aff., ¶ j; W. Mitchell Aff., ¶9.)

Billy Mitchell was subsequently incarcerated in a series of State penitentiaries, including Florida State Prison, "widely regarded among correctional experts as one of the most brutal and intense institutions in the South." (Haney Aff., ¶ 37). In Costello v. Wainwright, 397 F.Supp. 20 (N.D. Fla. 1975), aff'd, 525 F2d 1239 (5th Cir. 1976), the court observed as follows with respect to those institutions:

> A free democratic society cannot cage inmates like animals in a zoo or stack them like chattels in a warehouse and expect them to emerge as decent, law abiding, contributing members of the community.

(397 F.Supp at 38). Billy Mitchell is living proof of the court's observation.

Of Petitioner's time in jail, Dr. Haney observed:

> Billy's adjustment was also complicated by his age and appearance. As photographs of him at this time will attest, he looked younger than his 18 years. Youth operates in prison as a form of sexual currency. Young prisoners commonly fall prey to older ones in homosexual attacks that are often violent, even deadly. Billy was the target of such sexual confrontations throughout his stay in prison.

(Haney Aff., ¶ 31) (Emphasis added).

Mr. Mitchell's prison records reveal that, shortly after entering prison, he was "experiencing incarceration trauma," depression and severe headaches. In less than one month, Billy Mitchell lost 30 pounds. (Id., ¶¶ 33-34.) Dr. Haney also observed dramatic changes in Petitioner's personality during his incarceration (Id., ¶ 35), an observation confirmed by the testimony of Billy Mitchell's father:

> At that time Billy was 16 years old -- a junior in high school. When he went into the Florida prisons, he was a pretty trusting boy, but it was then that he began to get real distrustful of people. It wasn't hate, just distrust.

(W. Mitchell Aff., ¶ 10.)

Dr. Haney went on to observe that:

> Those patterns of behavior and scars of adjustment often remain with prisoners long after prisoners have been released. Billy Mitchell's mother told me, for example that. . . [after his release,] the slightest noise would awaken him, and he would jump straight up in bed, fists clenched, prepared to defend himself.

(Haney Aff., ¶ 40.)

Based upon his interviews and examinations, Dr. Haney, who had previously examined thousands of prisoners, including many capital defendants, and had testified in numerous capital trials, stated:

> The more carefully and deeply I examined the information available in this case, the more compelling the situational factors became. This

> is a young man who has confronted, and been influenced by, powerful economic, social, and institutional pressures.

(Id., ¶ 41.)

Based upon all of the information available to him, including the results of a Minnesota Multiphasic Personality Inventory given to Petitioner in prison, Dr. Haney concluded that "Billy Mitchell simply did not appear to have the kind of character or personality that is ordinarily associated with serious criminal activity." (Id., ¶42.) Rather, he diagnosed Petitioner as "a highly depressed young man who is experiencing a number of physical complaints, probably associated with external stress." (Id., ¶ 43.) Dr. Haney concluded that:

> As distinguished from numerous capital cases with which I have been involved, I find Billy Mitchell to be an unusually sympathetic defendant.

(Id., ¶ 47.)

Unfortunately for Billy Mitchell, his attorney brought none of this powerful mitigating evidence to the attention of the sentencing judge. Thus, the court knew about Billy Mitchell only that which the prosecution wanted him to know.

B. The Confession Issue

The aggravating circumstances supporting Billy Mitchell's death sentence rested, in large part, on two confessions given by Petitioner. In the district court, Petitioner adduced conflicting testimony from the two police officers who allegedly witnessed the first of those confessions, demonstrating either that: (1) there is substantial reason to believe that the confession was coerced; or (2) that the form by which Petitioner allegedly waived his Miranda rights is forged.

C. The Eighth Amendment Claim

In the District Court, Petitioner offered statistical evidence demonstrating that the Georgia death penalty statute is applied in a racially discriminatory manner, in violation of the Eighth Amendment.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

A. Petitioner Mitchell alleged in his Federal habeas corpus petition, filed in the District Court on June 12, 1978, that "he was denied the effective assistance of trial counsel... because of his court-appointed attorney's failure (i) to investigate adequately the facts of the case. . . and (iv) to present available mitigating evidence on Petitioner's behalf." (Pet's. St. of Claims at 2.) By Order dated June 7, 1983, Judge Bowen denied Petitioner's claim, finding that the assistance rendered to Petitioner had been effective. The court did not determine whether the assistance rendered had prejudiced Petitioner. (App. C at 907.)

On appeal, Petitioner contended that the district court had erred in finding that Petitioner was afforded effective representation at the sentencing phase. (Pet's Brief at 17) and that the evidence compelled a finding that Petitioner had suffered actual and substantial disadvantage. (Id. at 52). The Court of Appeals held that, while "counsel's failure to investigate and present mitigating background evidence presents a more difficult question" than Petitioner's other claims (App. A at 889), "in our judgment, the conduct of Mitchell's attorney did not require a finding by either the state or federal court that it was not reasonable." (Id.)

B. Petitioner alleged in his federal habeas petition that "his sentence of death was imposed pursuant to a pattern of wholly arbitrary and capricious infliction of capital

punishment" and "pursuant to a pattern and practice of discrimination on the grounds of race, sex and poverty" (Pet's St. of Claims at 3). Treating Petitioner's contention on this issue as consolidated with identical issues raised in Spencer v. Zant and Ross v. Hopper, the District Court issued an opinion refusing to hold an evidentuary hearing on the matter in any of those three cases. (App. B.)

On appeal, Petitioner argued that the district court had erred in refusing to hold an evidentiary hearing. (Pet's Brief at 67.) After oral argument, the court of appeals decided to withhold decision on that issue until the en banc court decided McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Spencer v. Zant, 715 F.2d 562 (11th Cir. 1983), on pet. for reh'g and for reh'g en banc, 729 F.2d 1293 (11th Cir. 1984); and Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc). (App. A. at 887-88.) The district court's denial of an evidentuary hearing was upheld by the en banc court in Ross, 756 F.2d at 491, and that order was affirmed as to Petitioner by the court of appeals. (App. A. at 888.)

C. Petitioner alleged in his federal habeas petition that "statements made to law enforcement officials were. . . involuntary and were extracted without a knowing and intelligent waiver of his rights." (Pet's St. of Claims, at 5.) The court refused to hold an evidentuary hearing on this claim. (App. B. at 100.) On appeal, Petitioner argued that the district court erred in that ruling and that the case should, therefore, be remanded for a full evidentiary hearing. (Pet's Brief at 59.) With respect to that claim, the court of appeals stated, "because we have concluded above that the State produced sufficient evidence on aggravating factors of

Mitchell's offenses in the absence of Mitchell's confessions, this claim is without merit." (App. A. at 890.)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CAPITAL DEFENDANT IS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY, WITHOUT JUSTIFICATION, FAILS TO INVESTIGATE OR PRESENT AT HIS SENTENCING TRIAL ANY OF THE POWERFUL MITIGATION EVIDENCE THAT WAS READILY AVAILABLE.

In Strickland v. Washington, _U.S._, 80 L.Ed.2d 674, (1984) this Court stated that, in a case alleging ineffective assistance of counsel:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether , despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

80 L.Ed.2d at 699. The importance of mitigating evidence to the fundamental fairness of a capital defendant's sentencing hearing was reflected in Justice Brennan's concurrence:

> In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). For that reason, we have repeatedly insisted "that the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

80 L.Ed.2d at 705 (Brennan, J., concurring and dissenting); See Lockett v. Ohio, 438 U.S. 586 (1978).

Here, Petitioner's counsel performed none of the pretrial preparation and investigation so critical to effective representation. As a result, counsel had no strategy for, and no evidence to present at, Petitioner's sentencing hearing. The sentencing court heard nothing about "the relevant aspects of [Billy Mitchell's] character and

background." Strickland v. Washington, supra, 80 L.Ed.2d at 705. Counsel's failure to look for or present any of the powerful mitigating evidence readily available to him "so undermined the proper functioning of the adversarial process" that Billy Mitchell's sentencing hearing "cannot be relied on as having produced just results." (Id., at 693.)

The performance of Billy Mitchell's attorney fell far below the level of counsel in Washington. Unlike Billy Mitchell's counsel, Washington's attorney "actively pursued pretrial motions and discovery." 80 L.Ed.2d at 683. Moreover, unlike Billy Mitchell, Washington had personally addressed the sentencing court during the plea colloquy and had advised the court of all available mitigating facts. Id. at 684, 701. And, based upon the trial court's well-known reputation, counsel in Washington reasonably decided that defendant's expressions of remorse and acceptance of responsibility were far more likely to avoid the death penalty than presentation of the weak available mitigation evidence. Id. at 684, 700-01. Billy Mitchell's counsel, on the other hand, had no sentencing phase strategy and presented no case whatsoever in mitigation.

Petitioner respectfully submits that, by holding that the representation rendered Billy Mitchell was not ineffective, the circuit court ignored the clear teaching of Washington, Eddings, Jurek and Lockett. That decision also conflicts directly with recent decisions by other courts of appeals. This court should, therefore, grant certiorari to address these important issues and provide further guidance on the import of Washington v. Strickland.

A. Mr. Miller Did Little, If Any, Pretrial Investigation Or Preparation.

During the period from August 12 to November 5, 1974, Mr. Miller, by his own admission, failed to undertake numerous actions essential to preparing and carrying out his client's defense.

1. Mr. Miller made no attempt to interview any potential mitigating witnesses. In fact, he passed up numerous easy opportunities to do so. (See supra, at 4.)

2. Mr. Miller made no effort whatsoever to obtain any of his client's school, medical, or psychological records, though he knew where Petitioner had attended school and where he had been incarcerated. (R-V at 10, 11, 21, 22, 57, 58.)

3. Mr. Miller never considered obtaining an expert evaluation of his client's psychological condition, (R-V at 12-13.), even though he observed dramatic inconsistencies between his client's behavior and his outstanding record of character and achievement. (R-V at 13.)

4. Mr. Miller failed to interview or subpena Officer Herbert Carr, whose mysterious role in Petitioner's interrogation casts serious doubt on the legality of Petitioner's confessions. (See infra, Section II.) Mr. Miller didn't interview Officer Carr -- a cousin of the murder victim -- even though Petitioner had informed him that Carr had held a gun to Petitioner's head, just prior to his first confession. Mr. Miller "didn't talk with Mr. Carr because I personally don't like the man." (R-V at 8.)

5. Mr. Miller failed to interview Mrs. James Carr, the sole witness to her son's slaying, even though he admittedly knew that she would be the key witness for the prosecution, that she was herself wounded in the head at the time she allegedly saw Petitioner shoot her son, and that her

testimony, if not suppressed, "was going to inflame the emotions" of the trier of fact. (R-V at 41.)[4/]

6. Mr. Miller failed to investigate any of the facts and circumstances of Petitioner's single prior conviction -- an attempted robbery conviction for which he was sentenced by a Florida court to a minimum term of only six months. This failure was particularly egregious, in light of the fact that Mr. Miller purportedly based his decision not to present any mitigating evidence at the sentencing hearing on his belief that any such evidence would be "annihilated" and "overwhelmed" by the prior conviction. (R-V at 33, 42-43.)

7. Mr. Miller made no pretrial motions whatsoever. (R-V at 47.)

In short, Mr. Miller failed to undertake any of the pretrial preparation or investigation that a reasonably competent attorney would have recognized as indispensable under the circumstances. He was content to meet briefly with his client[5/] and to review some of the state's evidence.[6/]

4/ Had counsel interviewed Mr. Carr, he would have found substantial grounds for suppression of her identification of Billy Mitchell as her assailant. See infra, at fn. 13.

5/ Contrary to the circuit court's opinion (App. A at 888), the district court's characterization of the meetings between Billy Mitchell and his attorney as "lengthy" is neither supported by any evidence in the record (see supra, fn. 2) nor a "historical fact" entitled to any presumption of correctness under 28 U.S.C. § 2254(d).

6/ The reason for counsel's willingness to rely totally on the State's evidence is demonstrated by his observation that his relationship with Sylvester police officers was:

> not a cat and mouse game as it is in some larger communities, and I believe firmly that when I inquire of any of these people who are well known to me . . . they give me straight forward, forthright answers about any of the things that they know about in the investigation, or that has

(Footnote Continued)

Consequently, trial counsel presented no defense whatsoever at the sentencing phase of Petitioner's trial.

B. Counsel's Failures Were Not Justified By "Strategic Decisions" Or Otherwise.

The court of appeals offered three justifications for Mr. Miller's failure to investigate mitigating evidence. However, each of those rationalizations either ignores this Court's teachings in Washington or conflicts directly with decisions of other circuit courts.

First, the fact that Mitchell may have "discouraged" his attorney from involving his family in his problems (App. A at 889) is an insufficient basis for justifying Mr. Miller's total lack of investigation. It should be noted that Mr. Miller freely disobeyed his client's "wishes" when he spoke on at several occassions with Billy Mitchell's father and with an attorney from Jacksonville who had been sent by Mr. Mitchell's family, about possible fee arrangments. (R-V at 26.) Having disregarded his client's "wishes" when it suited his own purposes, Mr. Miller should not be allowed to invoke that reluctance to justify his own failure to develop a case in mitigation.

More importantly, even the court of appeals found that "the attorney did not probe deeply into Mitchell's reasons for not wishing to involve his family." (App. A at 890.) In fact, Mr. Miller testified that he had no idea what motivated his client's reluctance. (R-IV at 63.) And there

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(Footnote Continued)
come to their knowledge.

But this type of symbiotic relationship between prosecution and defense has no place in "the adversarial process that our system counts on to produce just results." Strickland v. Washington, supra, 80 L.ED.2d at 699.

is no evidence that Mr. Miller made any efforts to explain to his client the dire ramifications of his "reluctance" -- that he was throwing away his only chance of avoiding execution. Mr. Miller's acquiescence in his client's purported wishes left Billy Mitchell with no sentencing phase defense whatsoever.[7/]

In Gaines v. Hopper, 525 F.2d 1147 (5th Cir. 1978), the Fifth Circuit addressed just such a situation. At his client's insistence, trial counsel in that case relied upon an alibi defense at trial. The court of appeals found that this representation amounted to ineffective assistance of counsel, because counsel's failure to interview eyewitnesses left him totally unable to advise his client of the weaknesses in his alibi defense. Moreover, although counsel was aware of a possible mitigation defense, his failure to investigate left him unable to advise his client of the relative strength of that potential defense. The circuit court cited with approval the district court's "careful and scholarly opinion." 575 F.2d at 1148. In that opinion, the district court held that:

> uncritical acquiescence in the client's approach to the case is not acceptable, particularly when investigation would reveal that the client's position is hopeless and that there are more promising alternatives.

430 F.Supp. at 1178-79.

7/ This case is easily distinguishable from the cases relied upon by the court of appeals in this regard -- Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984) and Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983) cert. denied, __ U.S. __, 104 S. Ct. 2375, 80L.Ed.2d 847 (1984) (App. A at 889.) In Autry, the defendant unequivocally instructed counsel that he wanted to receive the death penalty. There is certainly no such evidence here. In Foster, defendant's instructions were also far clearer than any "reluctance" on Billy Mitchell's part. Moreover, the defendant there instructed counsel to pursue an alternate defense. Here, (Footnote Continued)

The California Supreme Court has recently decided, like the Fifth Circuit, that a client's uninformed wishes do not excuse counsel's failure to investigate. In People v. Mozingo, 34 Cal.3d 926; __P.2d__ (Nov. 1983), defendant refused to plead an insanity defense or to cooperate with a psychatrist. Despite those refusals, the court held that counsel had rendered ineffective assistance by failing to investigate psychiatric evidence:

> Counsel must attempt to investigate the issue despite his client's objections, and thereby inform and advise his client accordingly, leaving the ultimate decision to him.

34 Cal.3d at 934. And in Strickland v. Washington, supra, this Court observed that "counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant." 80 L.3d.2d at 695 (emphasis added). See, Gray v. Lucas, 677, F.2d 1086, 1094 (5th Cir. 1982), cert denied, 461 U.S. 910 (1983) (client's desire not to present character evidence does not negate duty to investigate.)

Like the lawyer in Gaines, Mr. Miller was "in no better position than his jailed client to evaluate the legal and factual realities of the case." Id. at 1179. He conducted none of the basic investigation and none of the basic counselling necessary to justify acquiescence in his client's wishes. By holding that Mr. Miller's "uncritical acquiescence" in his client's purported wishes excused his falure to investigate, the decision below conflicts directly with the Fifth Circuit's opinion in Gaines.

(Footnote Continued)
counsel's acquiescence in Petitioner's "reluctance" left him with no sentencing phase defense whatsoever.

The second excuse offered by the court of appeals for Mr. Miller's failures simply does not hold water. Counsel's purported belief that Petitioner's father -- who was allegedly uncooperative[8/] -- was the "only avenue into the family situation" (App A at 889, 890) was palpably unreasonable in light of the uncontradicted evidence. Counsel's own testimony demonstrates that the Mitchell family arranged for a lawyer to travel from Jacksonville to discuss the case with Mr. Miller. (R-VI at 53-54.) And counsel testified that he was aware that members of the Mitchell family came to Georgia regularly to visit Petitioner in jail. (R-VI at 67, 93.) Finally, Billy Mitchell's father, mother and sister attended the trial and pre-sentencing hearing, and were willing to testify on Petitioner's behalf. (W. Mitchell Aff., ¶ 14; J. Mitchell Aff., ¶ n & o; G. J. Mitchell Aff., ¶ o.) In light of the many opportunities which admittedly fell in his lap, Mr. Miller's purported belief that he had no "avenue into the family situation" was utterly unreasonable and cannot excuse the duty of investigation imposed by Washington.

Third, counsel's "belief" that any mitigation evidence would be "thoroughly rebutted by" evidence of Mr. Mitchell's prior conviction (App. A at 889.) was, as a matter of law, insufficent to excuse his failure to investigate. Mr. Miller's "belief" in this regard was based upon a total ignorance of the relevant facts. Counsel was admittedly unaware of and did not investigate the nature of his client's

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8/ The senior Mr. Mitchell denies that Clarence Miller ever spoke to him about anything until after his son had been sentenced to death. (W. Mitchell Aff. ¶ 14.)

prior conviction. (See supra, at 20.) Because he also made no investigation into possible mitigation evidence, Mr. Miller was equally unable to assess the strength of the mitigation case available to him. Therefore, he was in no position whatsoever to balance the potential harm which introduction of that prior conviction might have against the potential benefit to be derived from presenting mitigation evidence. Totally uninformed decisions of this sort are, as a matter of law, not reasonable.

In holding otherwise, the Eleventh Circuit's decision conflicts directly with the Eighth Circuit's decision in Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983). There,

> the district court concluded that it was part of [counsel's] trial strategy to put on no evidence at all rather than introduce this type of potentially damaging mitigating evidence.

714 F.2d at 1467. The circuit court disagreed with the district court's conclusion, finding that "[g]iven the severity of the potential sentence and the reality that the life of [his] client was at stake, we find that it was incumbant upon Pickens' counsel to offer mitigating proof." 714 F.2d at 1467. The Court concluded:

> The error of the district court in evaluating the strategy of Pickens' counsel is that it fails to consider that it is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be the most helpful to the client's case. . . . [Here, counsel] did no investigation into any possible mitigating evidence. He was left with no case to present. A total abdication of duty should never be viewed as permissible trial strategy.

714 F.2d at 1467 (emphasis in original).

In a recent decision, the Fifth Circuit acknowledged the defference to counsel's conduct which is mandated by this Court's Washington decision, but noted:

> [a] substantial body of Fifth Circuit case law insists, however, "that 'effective counsel conduct a reasonable amount of pretrial investigation.'" . . . [T]his circuit has recognized that, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case,

Nealy v. Cabana, 784 F.2d 1173, 1177 (5th Cir. 1985) (Citations omitted). Applying this standard, the Fifth Circuit concluded that

> [Nealy's counsel] simply failed to make the effort to investigate. [Counsel], therefore, "did not choose, strategically or otherwise, to pursue one line of defense over another. Instead [he] simply abdicated his responsibility to advocate his client's cause." [Counsel's] failure to investigate thus resulted in a "factual vacuum" and cannot withstand sixth amendment scrutiny.

764 F.2d at 1178. (emphasis in original)).[9/]

The decision below, by deeming "strategic" a decision made without any investigation, conflicts directly with the Fifth Circuit's decision in Pickens and Nealy.

Mr. Miller himself testified that he formulated only one "strategy" for representing his client at the sentencing phase of his trial. Counsel allegedly believed that he could exclude all evidence of aggravating circumstances at the sentencing hearing, because the prosecution had given him oral -- but not written -- notice of the evidence it intended to introduce at the sentencing hearing. (App. C at 784.) (R-V at 16-17.) Mr. Miller called this "strategy" his "ace-in-the-hole" (R-VI at 43.) Unfortunately for Billy Mitchell, Mr. Miller's

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9/ Other recent appellate decisions also hold that defense counsel must make a reasonable pretrial investigation in order to provide constitutionally effective assistance of counsel. Keyes v. Duckworth, 761 F.2d 390, 392 n.3 (7th Cir. 1985); Johnson v. Mabry, 752 F.2d 313, 315, n.2 (8th Cir. 1985); Crisp v. Duckworth, 743 F.2d 580, 583-84 (7th Cir. 1984).

"ace-in-the-hole" was legally erroneous and tactically foolish.[10/]

If Mr. Miller had done any legal research into his purported defense strategy, he would have discovered that his legal theory was, at best, a weak one. The statute upon which he was relying so heavily did not specifically require that notice of aggravating circumstances be given in written form.[11/] And, while there were no Georgia cases in existence at that time which construed that new statute, the case law construing the virtually identical predecessor statute[12/] did not require that written notice be given, but only that notice of aggravating circumstances "should be clear." Gates v. State, 229 Ga. 796, 194 S.E.2d 412, 414 (1972).

Moreover, even if Mr. Miller's legal interpretation of the statute had been correct, his reliance upon it as his primary line of defense would have been completely unreasonable. Whether the statute required written or unwritten notice, it required by its very terms only that such notice be given "prior to trial." Thus -- even under Mr.

10/ Curiously, the court of appeals' opinion does not even mention Mr. Miller's "ace-in-the-hole" theory.

11/ That statute provided, in pertinent part:

> In such pre-sentence hearing, the judge shall hear additional evidence on extenuation, mitigation, and aggravation of punishment including the record of any prior criminal convictions and pleas of guilty. . . . Provided, however, that only such evidence on aggravation as the state has made known to the defendant prior to his trial shall be admissible.

Ga. Code Ann. §27-2503(a).

12/ The prior statute, §27-2534 was identical to §27-2503(a), except that the former provided that "in such pre-sentencing hearing, the jury or judge shall hear additional evidence. ..."

Miller's view of the law -- the prosecution could have handed him written notice of aggravating circumstances at any time prior to commencement of trial, thereby destroying totally the primary sentencing phase "defense" which he had formulated for his client. No competent criminal defense attorney would forsake all other forms of pretrial investigation and preparation of a capital case, in favor of so fragile a "strategy".

Not only was Mr. Miller's "ace-in-the-hole" strategy unreasonable in its formulation, its execution was abysmal as well. After allegedly formulating, as Petitioner's sole sentencing phase defense, a legal argument designed to exclude evidence of Petitioner's prior conviction, Mr. Miller voluntarily brought to the Court's attention the fact of his client's prior record as soon as the sentencing hearing began (R-I at 200.)

Thus, neither the excuses offered by the court of appeals nor the "strategy" which Mr. Miller claims to have formulated can justify counsel's total lack of pretrial investigation and preparation. The resulting breakdown of the adversarial process at Petitioner's sentencing hearing cannot be excused.

C. There Is A Reasonable Probability That, But For Counsel's Unprofessional Errors, The Result Of Billy Mitchell's Sentencing Proceeding Would Have Been Different.

In Strickland v. Washington, supra, the Court confirmed what all of the circuits had held -- in order to get relief for ineffective assistance of counsel, a defendant must show not only that trial counsel was ineffective, but also that counsel's errors actually had an adverse effect on the defense. 80 L.Ed.2d at 697. The Court defined the requisite showing of prejudice as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id., at 698.

Petitioner respectfully submits that this Petition presents the clearest imaginable case of prejudice in a claim of ineffective assistance at the sentencing phase. As discussed in detail above, an extraordinary case in mitigation was available to Billy Mitchell's attorney. But, because counsel failed to investigate, the sentencing court heard none of that evidence. In fact, the sentencing judge heard absolutely nothing positive about Billy Mitchell. Because there was no guilt-phase trial and because Petitioner did not speak at his sentencing hearing, the sentencing court had before it only the fact that Billy Mitchell had pled guilty to murder plus the aggravating evidence presented to it by the prosecution.

A more total breakdown of the adversarial process at the sentencing phase is difficult to imagine. The prosecution placed on its side of the scale extremely detailed and highly emotional aggravating evidence. Because he had done no pretrial investigation, Mr. Miller had no evidence whatsoever to place on Billy Mitchell's side. It is not surprising, therefore, that Billy Mitchell was sentenced to death. There is certainly a reasonable probability that, had counsel presented the sentencing court with <u>any</u> of the extraordinary mitigating evidence discussed above, the balance would have shifted in favor of sparing Billy Mitchell's life. Indeed, it is hard to imagine otherwise.

* * *

Petitioner respectfully submits that the Court should grant certiorari to resolve the conflicts between the decision herein and the cases addressed above, and to resolve the issue it did not reach in Washington v. Strickland -- is a capital defendant denied his Sixth Amendment right to effective assistance of counsel which his attorney fails, without justification, to investigate and present powerful and redily available mitigation evidence at his sentencing hearing?

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE MAY REST, EVEN IN PART, ON AN UNCONSTITUTIONALLY COERCED CONFESSION.

In sentencing Petitioner to death, the trial judge found only two aggravating circumstances -- that Petitioner committed aggravated battery and also armed robbery in the course of the killing. (R-I at 164.) The state's proof of these aggravating crimes rested substantially on two confessions Petitioner made while in police custody. The record raises some alarming questions about the voluntariness and legality of those confessions. Yet the district court denied relief and refused to hold an evidentiary hearing on this claim. The court of appeals affirmed the district court's refusal on the ground that "the State produced sufficient evidence on aggravating factors of Mitchell's offenses in the absence of Mitchell's confessions." (App. A at 890.) The court thereby raised and, Mitchell submits, wrongly resolved a major issue of constitutional law.

According to the police, Billy Mitchell signed a written waiver of his Miranda rights shortly before confessing. The form contains the signatures of two officers who purportedly witnessed the waiver -- Chief of Police Tommy Marchman and Officer Herbert Carr. (R-I, at 266.) Herbert

Carr -- a cousin of the shooting victim -- is the pivotal mystery figure in the whole issue of Mitchell's confession. (R-I at 229.) According to Marchman's testimony (T.M. Dep. at 59) and the waiver form, Carr came to work more than an hour and a half before his shift began, to participate in the interrogation of a man accused of killing his relative. And by Carr's own admission, he was "really . . . upset" that morning about the death of his young relative at the hands (as he put it) of a "damned black nigger." (H.C. Depo. at 18.) According to Petitioner, a .357 magnum revolver was held to his head prior to the first confession. (R-I at 135-36; R-VI at 38-39.)

Herbert Carr, however, denies under oath that he was even present at Billy Mitchell's interrogation. Indeed, Herbert Carr testified that he did not learn until the next day that Petitioner had confessed, and never took any part in investigating the crime. (H.C. Depo. 15 26, 29, 31-32.)

If Officer Carr was, in fact, present at the time of Petitioner's confession, his role raises serious doubts about the voluntariness of Petitioner's waiver and confession. On the other hand, if Herbert Carr did not witness Petitioner's waiver of Miranda rights, the waiver form is forged or fraudulent. Either version of the story casts substantial doubt upon the admissibility of Mitchell's statements, and raises serious suspicions about whether the police had something to hide.

The Court of Appeals excused the district court's erroneous refusal to hold a hearing on this issue on the grounds that the aggravating circumstances were supported by

other evidence. (App. A at 890.)[13/] But that holding ignores the clear teaching of this Court. In Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983), the Court indicated that, even though a death verdict may rest in part on an aggravating circumstance unsupported by any categories in the state death penalty statute, a death verdict must be set aside if the State's case for aggravation rests -- even in part -- on "any factors that are constitutionally impermissible," Id. at 885, or any "misinformation of unconstitutional magnitude," Id. at 887, n. 23, quoting, United States v. Tucker, 404 U.S. 443, 447-49, 30 L.Ed.2d 592 (1972). In Stephens, the Court did not have to decide that issue squarely because the allegedly improper aggravating circumstance there -- the defendant's previous criminal record -- raised no question of constitutional taint.

But a claim of coerced confession, such as Mitchell's is the paradigm of constitutional error. Use of such a confession to support a death penalty threatens the central principle embraced by this Court that "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.21 973

13/ The only other evidence supporting the death penalty -- Mrs. James Carr's sentencing phase identification of Petitioner as her assailant -- is scarcely reliable. Mrs. Carr admittedly had "very, very limited vision" at the time of trial as a result of her wounds and could only recognize another person "by getting as close as possible", taking a few minutes . . . [and] turn[ing her head] in several different directions at different lenghts . . . to get adjusted." (R-I at 213.) Mrs. Carr had not previously identified Petitioner at a line-up in a photographic array, and her identification was based entirely on a "show-up" identification in court at a time when Petitioner (in Mrs. Carr's words) was the only "colored man sitting right over here" (R-I at 215), i.e., "inside the bar dock" of the courtroom. (R-I at 213.)

(1978). Accordingly, Petitioner respectfully submits that the Court should grant certiorari to decide directly the issue to which it alluded in Zant -- may a death sentence rest, even in part, on constitutionally impermissible evidence?

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE GEORGIA DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF THE EIGHT AMENDMENT.

With respect to Mitchell's Eighth Amendment claim that the Georgia death penalty has been applied in a discriminatory manner, the Eleventh Circuit decided to withhold its decision pending the en banc resolution of McCleskey v. Kemp, 753 F.2d 877(11th Cir. 1985) (en banc); Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), on pet. for reh'g and for reh'g en banc, 729 F.2d 1293 (11th Cir. 1984); and Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985). (See App. A at 887-88) In so doing, the Circuit Court recongized that, with respect to this claim, Billy Mitchell's appeal involves factual and legal issues identical to those raised in McCleskey and Ross.

A petition for writ of certiorari was filed in McClesky on May 28, 1985.[14/] That petition raises significant questions as to whether the Georgia death penalty statute is applied in a racially discriminatory manner, in violation of the Eighth Amendment -- for example, must a defendant prove discriminatory intent in the application of the death penalty

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14/ Amici curiae briefs in support of McCleskey's petition have been filed by the Congressional Black Caucus, the International Human Rights Group, and by four professors of social science and statistics (Dr. Peter Sperlich, University of California at Berkeley; Dr. Marvin Wolfgang, University of Pennsylvania; Prof. Hans Ziesel, University of Chicago, and Prof. Franklin Zimring, Boalt Hall School of Law). All of above briefs were filed with the Court on June 28, 1985.

or, as Judge Johnson forcefully argued in his dissent in McClesky, will "a pattern of death sentences alone... support a claim of arbitrary and capricious sentencing in violation of the Eighth Amendment?" 753 F.2d at 910.

Petitioner respectfully submits that, for the reasons set forth in the McClesky petition, the Court should also grant certiorari in this case.

CONCLUSION

The Petition for Certiorari should be granted.

September 30, 1985 Respectfully submitted,

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be eligible for release on parole after serving one-third of this sentence. There is no merit to her argument that her sentence is unconstitutionally excessive.

The judgments of conviction are AFFIRMED.

William "Billy" MITCHELL, Petitioner-Appellant,

v.

Ralph KEMP, Warden, Respondent-Appellee.

No. 83-8649.

United States Court of Appeals, Eleventh Circuit.

May 23, 1985.

In two separate orders, the United States District Court for the Southern District of Georgia, 538 F.Supp. 77 and 564 F.Supp. 780, Dudley H. Bowen, Jr., J., denied all of petitioner's asserted grounds for habeas corpus relief, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) conduct of petitioner's defense attorney was not constitutionally unreasonable, and (2) defense counsel's failure to investigate and present mitigating background evidence at capital sentencing hearing did not constitute ineffective assistance of counsel.

Affirmed.

1. **Criminal Law ⇐641.13(1)**

Sixth Amendment guarantees a defendant right to reasonably effective assistance of counsel. U.S.C.A. Const. Amend. 6.

2. **Criminal Law ⇐641.13(6)**

Criminal attorney is not required to investigate, but scope of investigation is governed by a reasonableness standard. U.S.C.A. Const.Amend. 6.

3. **Criminal Law ⇐641.13(6)**

A defense attorney's decision not to investigate must not be evaluated with benefit of hindsight but accorded a strong presumption of reasonableness. U.S.C.A. Const.Amend. 6.

4. **Criminal Law ⇐641.13(6)**

Conduct of petitioner's defense attorney, who investigated the case by interviewing several of the police officers involved and examining the state's physical evidence but who did not interview officer whose signature appeared on petitioner's waiver of *Miranda* rights form or the woman seriously injured by petitioner and mother of boy killed by petitioner, was not constitutionally unreasonable. U.S.C.A. Const.Amend. 6.

5. **Criminal Law ⇐1166.11(5)**

Errors by counsel at capital sentencing hearing require reversal of the sentence only where there is a reasonable probability that, absent the errors, the sentencer, including an appellate court to extent that it independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const. Amend. 6.

6. **Criminal Law ⇐641.13(6)**

Petitioner's defense counsel's failure to interview police officer whose signature appeared on petitioner's waiver of *Miranda* rights form and the woman seriously injured by petitioner and mother of the boy killed by petitioner, did not prejudice petitioner.

7. **Criminal Law ⇐641.13(7)**

Defense counsel has no absolute duty to present mitigating character evidence at sentencing hearing.

APPENDIX A

8. Criminal Law ⇐641.13(7)

Defense counsel's failure to investigate and present mitigating background evidence at capital sentencing hearing did not constitute ineffective assistance of counsel where that strategic decision was made after petitioner discouraged attorney from undertaking such an investigation and where counsel determined that there was no possibility of finding anything helpful after petitioner's father indicated an unwillingness to be of assistance. U.S.C.A. Const.Amend. 6.

9. Habeas Corpus ⇐25.1(6)

When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made on petition for writ of habeas corpus. U.S.C.A. Const.Amend. 6.

10. Habeas Corpus ⇐90.2(6)

District court, which denied habeas corpus relief to petitioner who pled guilty to murder and was sentenced to death, did not err in refusing to hold an evidentiary hearing on voluntariness of petitioner's confession where state produced sufficient evidence on aggravating factors of petitioner's offenses in absence of petitioner's confession.

James S. Liebman, John C. Boger, New York City, Anthony G. Amsterdam, N.Y. University Law School, New York City, Michael L. Rugen, Andrea Asaro, Andrew W. Char, San Francisco, Cal., Robert Weisberg, Stanford Law School, Stanford, Cal., for petitioner-appellant.

Susan V. Boleyn, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, FAY and CLARK, Circuit Judges.

RONEY, Circuit Judge:

William "Billy" Mitchell pled guilty to murder and was sentenced to death. On appeal from the district court's denial of habeas corpus relief, Mitchell raises [illegible] issues: (1) whether the district court should have conducted an evidentiary hearing on his assertion that the death penalty in Georgia is being administered in an arbitrary and racially discriminatory manner; (2) whether his counsel was ineffective during the sentencing phase of his trial; and (3) whether the district court should have heard evidence regarding the legality and voluntariness of Mitchell's confessions which were admitted at Mitchell's sentencing hearing. We affirm.

During the armed robbery of a convenience store, Mitchell shot and killed fourteen-year-old Christopher Carr and seriously wounded the boy's mother. He was captured later that same day and shortly after being taken into custody made two confessions. Following his plea of guilty, a sentencing trial was held before a judge. The State proved aggravating circumstances in the murder of Christopher Carr by the admission of Mitchell's confessions and through Mrs. Carr's testimony. The aggravating factors established were that Mitchell had murdered the boy during the commission of armed robbery and aggravated assault. No mitigating evidence was offered.

Mitchell's conviction and sentence were affirmed by the Georgia Supreme Court. *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3224, 49 L.Ed.2d 1219 (1976). He unsuccessfully sought habeas corpus relief in state court. *Mitchell v. Hopper*, 239 Ga. 781, 239 S.E.2d 2 (1977), *cert. denied*, 435 U.S. 937, 98 S.Ct. 1513, 55 L.Ed.2d 534 (1978). A petition for a writ of habeas corpus was then filed in federal district court. In two separate orders, the district court denied all of Mitchell's asserted grounds for relief. *Mitchell v. Hopper*, 538 F.Supp. 77 (S.D.Ga.1982); *Mitchell v. Hopper*, 564 F.Supp. 780 (S.D.Ga.1983).

After oral argument on January 31, 1984, this Court decided to withhold decision in this case until the *en banc* Court decided *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (*en banc*), *Spencer v. Zant*,

trict court entered a single order as to petitioners Mitchell, Spencer, and Ross denying an evidentiary hearing on the argument concerning discriminatory application of Georgia's death penalty. *Mitchell v. Hopper*, 538 F.Supp. at 89–91. The *en banc* Court having now upheld the denial of an evidentiary hearing in *Ross*, 756 F.2d at 1491, that order of the district court is now affirmed as to Mitchell.

Mitchell makes a two-pronged ineffective assistance of counsel at sentencing claim. First, as to aggravating facts, he claims that had his attorney interviewed police officer Herbert Carr and Christopher Carr's mother, the attorney could have excluded certain of the state's proof on aggravating factors at the sentencing trial. Second, as to mitigating factors, he claims that if his attorney had investigated Mitchell's background, he would have discovered powerful mitigating evidence. Mitchell submitted in district court evidence which showed that he was raised in an impoverished home where after the breakup of his parents he had to act as a substitute father for his siblings. At the age of 18, Mitchell was convicted of attempted robbery and was sent to prison where he was subject to violent homosexual rapes. Affidavits submitted by Mitchell showed that numerous persons of some stature in the community were willing to testify to his good character as a youth.

We have a detailed record on the ineffectiveness issue. Mitchell's attorney testified at both the state and federal evidentiary hearings. Mitchell was appointed counsel the day after he was arrested. His attorney met with him briefly at this time and scheduled a meeting. The state habeas corpus court found as a fact that the attorney met with Mitchell for lengthy interviews on at least four occasions prior to Mitchell's [illegible]. As a historical fact, this finding was entitled to a presumption of correctness in the district court. 28 U.S.C.A.

same day the attorney spoke with [illegible] Mitchell. During the meetings the attorney questioned Mitchell in detail about his background. The attorney asked about family, friends, or school teachers who might be character witnesses for Mitchell. The attorney thought Mitchell was very open with him in answering these questions. Mitchell explained that he came from a good, hard-working family but that he was the "black sheep." Mitchell discouraged the attorney from contacting his family. Nevertheless, the attorney did telephone Mitchell's father. He said the father's reaction was one of indifference. The father would not give definite views as to whether he was able to provide [illegible] Mitchell's defense.

The attorney investigated the case by interviewing several of the police officers involved and examining the State's physical evidence. He did not interview Officer Herbert Carr, whose signature appeared on Mitchell's waiver of *Miranda* rights form. Carr was a distant relation of the deceased boy. The attorney testified that he did not interview Carr because he did not like Carr and because he thought the other police officers had spoken truthfully with him. The attorney also did not interview Mrs. Carr, the woman variously named by Mitchell and mother of the deceased boy.

[1][2][3][4] The Sixth Amendment guarantees a defendant the right to reasonably effective assistance of counsel. Strickland v. Washington, — U.S. —, — S.Ct. —, — L.Ed.2d —, 52 U.S.L.W. 4565 (1984). A criminal attorney has the duty to investigate, but the scope of investigation is governed by a reasonableness standard. As stated by the Supreme Court, counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations [illegible] — U.S. at —, 104 S.Ct. at —, — L.Ed.2d at —. The reasonableness of decisions on the scope of investigation

— U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. The attorney's decision not to investigate must not be evaluated with the benefit of hindsight but accorded a strong presumption of reasonableness. — U.S. at —, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. In our judgment, the conduct of Mitchell's attorney did not require a finding by either the state or federal court that it was not reasonable.

[5, 6] In any event, errors by counsel at a capital sentencing hearing require reversal of the sentence only if "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 698. Regardless of whether it was reasonable for Mitchell's attorney not to interview Officer Carr and Mrs. Carr, the failure to interview did not prejudice Mitchell, as required by *Washington*. The State attempted to show as aggravating factors that Mitchell had murdered Christopher Carr while in the commission of armed robbery and aggravated battery. To prove these two crimes, the State relied on Mitchell's confessions and Mrs. Carr's testimony. Whether or not the confessions were involuntary, Mitchell admitted in his [illegible] that he killed Christopher Carr. Even if Mrs. Carr's identification of Mitchell should have been excluded because of the [illegible] due to her eyesight by the [illegible] and in the robbery there was no [illegible] her testimony that the man who shot her son shot her and robbed the store. Mitchell suffers no prejudice.

[7, 8] [illegible] to investigate and present mitigating background evidence prevents a more [illegible]

[illegible] at 2065. *See Strickland v. Washington*, — U.S. at —, 104 S.Ct. at 2071, 80 L.Ed.2d at 701; *Adams v. Wainwright*, 709 F.2d 1443, 1445–46 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

Three reasons were given by the attorney for conducting no investigation of Mitchell's background other than questioning Mitchell and holding two telephone conversations with Mitchell's father. First, Mitchell discouraged the attorney from undertaking such an investigation. The attorney testified that Mitchell continually told him not to involve his family because "he was the black sheep. He would stand it. He would do it. Leave them out of it." Second, the attorney thought his only "avenue into the family situation" was Mitchell's father, and this approach proved fruitless. Third, the attorney believed that based on his conversations with Mitchell, "the possibility of finding anything that might be helpful in [Mitchell's] defense was nil." The attorney never presented any witnesses to address Mitchell's character because he concluded that this type of evidence would have been thoroughly rebutted by Mitchell's prior conviction.

[9] When a defendant preempts his attorney's attempts to investigate and present different defenses by insisting that a different defense be followed, no claim of ineffectiveness can be made. *Fowler v. Strickland*, 707 F.2d [illegible] *cert. denied*, — U.S. —, 104 S.Ct. 2677, 80 L.Ed.2d 847 (1984); *see Autry v. McKaskle*, 727 F.2d [illegible] with the [illegible] Nonetheless, [illegible] evaluation of potential defenses to criminal charges and meaningful discussion with the client of the fruits of the [illegible] effective assistance [illegible] *Hopper*, 727 F.2d [illegible] *Washington*, —

[illegible] 104 S.Ct. [illegible] 80 L.Ed.2d [illegible] 1984). The [illegible] F.2d [illegible] although a trial lawyer's stated doubt [illegible] character witnesses does not negate the duty to investigate, it limits the scope of the investigation required. *Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983).

It is important to note that Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it. Although it appears the attorney did not probe deeply into Mitchell's reasons for not wishing to involve his family, the attorney made an independent evaluation of the usefulness of character witnesses by an in-depth conversation with Mitchell. Even Mitchell complained that the attorney acted more like a "sociologist" than a lawyer. Considering all the circumstances, including the information the attorney learned from Mitchell, Mitchell's directions, and Mitchell's father's indifference, the attorney acted reasonably when he decided not to pursue an investigation independent of Mitchell or his father. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Washington*, — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

The attorney was not ineffective for not having called any members of Mitchell's family to testify as to mitigating character evidence. Although the attorney was mistaken in thinking Mitchell's prior conviction would not come in unless the defense called character witnesses, *see* O.C.G.A. § 17-10-2, this does not make unreasonable his assumption that the conviction would substantially outweigh any testimony as to Mitchell's good character as a youth. The ability to obtain such good character evidence at the time was inhibited by Mitchell's direction not to call his family and Mitchell's father's indifference toward aiding his son. Moreover, it was reasonable for the attorney to assume that the presentation of good character evidence might motivate the State to introduce Mitchell's [illegible] In fact, the State did not introduce Mitchell's prior conviction during the sentencing phase, and Mitchell's attorney was able to emphasize the absence of any evidence of prior convictions in closing argument. 564 F.Supp. at 785.

[10] Mitchell raises two other issues related to his ineffectiveness claim. First, he contends that the district court should have held an evidentiary hearing on the voluntariness of Mitchell's confession. Because we have concluded above that the State produced sufficient evidence on aggravating factors of Mitchell's offenses in the absence of Mitchell's confessions, this claim is without merit. Second, Mitchell argues the district court improperly excluded the testimony of expert witnesses who would have addressed the reasonableness of Mitchell's attorney's performance and Mitchell's psychological makeup. The court received proffers of the experts' testimony at the evidentiary hearing and indicated it would enter an order in writing if the proffers were considered as evidence. In its final order, the court stated:

> At this Court's hearing on May 18, 1982, I was fully apprised of the type and quantity of mitigation evidence which petitioner claims [his attorney] should have offered. So that the Court of Appeals can also assess the mitigation evidence proffered by the petitioner, the petitioner's motion to expand the record to include some twenty-four affidavits is hereby granted. I see no need for additional testimony.

564 F.Supp. at 781 n. 1. This indicates the court considered Mitchell's proffers as evidence. Treating the proffered affidavits as part of the record in this case, the evidence still does not support Mitchell's claim that his counsel was ineffective.

AFFIRMED.

and searching for items not covered by the agreement. Consent to a search is not a contract. Plaintiff, therefore, cannot claim the benefit of the five year limitation on contract actions. Va.Code Ann. § 8.01-246(2).

Since plaintiff does not come within any exception to the statute of limitations, his action is time barred, and must be *DISMISSED*.

Because of this resolution of the statute of limitation questions, there is no need to consider defendants other defenses. A cursory review of these defenses, however, does indicate that many of them, including collateral estoppel, res judicata, failure to state an essential element of malicious prosecution, immunity, and lack of standing are meritorious.

For the reasons above stated, plaintiff's complaint is DISMISSED.

It is so ORDERED.

Plaintiff is advised that he may appeal *in forma pauperis* from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, Post Office Box 1318, Norfolk, Virginia 23501, which said written notice of appeal must be received by the Clerk within thirty (30) days from the date of this Order and may be filed without prepayment of costs or giving of security.

The Clerk is directed to send a copy of this Order to plaintiff and to the attorneys for each of the defendants.

William "Billy" MITCHELL, Petitioner,

v.

Joe S. HOPPER, Warden, Georgia State Prison, Respondent.

Willie X. ROSS, Petitioner,

v.

Joe S. HOPPER, Warden,[1] Georgia State Prison, Respondent.

James Lee SPENCER, Petitioner,

v.

Walter D. ZANT, Warden, Georgia Diagnostic & Classification Center, Respondent.

Civ. A. Nos. CV478-132, CV478-162 and CV179-247.

United States District Court, S. D. Georgia, Savannah and Augusta Division.

April 1, 1982.

Three state prisoners under sentence of death sought habeas corpus. The United States District Court, Bowen, J., held that: (1) Georgia death penalty was not shown to be imposed in an arbitrary or discriminatory manner; (2) defendants had waived challenges to jury selection system; (3) appellate sentencing reviewed procedure as followed by the Supreme Court of Georgia are constitutionally sufficient; (4) electrocution as a means of capital punishment is not unnecessarily cruel and tortious, (5) trial court in one case properly denied motion for change of venue, (6) one defendant was not shown to have received ineffective assistance of counsel; and (7) error in giving instruction which shifted burden of proof was harmless in view of the overwhelming weight of the evidence.

1. Joseph S. Hopper was the warden at the Georgia State Prison where the petitioners were confined at the time these petitions were filed. Charles M. Montgomery is the present warden there. He would be automatically substituted as respondent under Fed.R.Civ.P. 25(d), except that the petitioners are now all confined at the Georgia Diagnostic and Classification Center in Jackson, Georgia, where Walter D. Zant is the warden. He will be considered a successor in interest for purposes of the petitions of William Mitchell and Willie Ross under Fed.R.Civ.P. 25(c), and is hereby substituted as respondent.

Order accordingly.

Opinion supplemented. D.C., 538 F.Supp. 105.

1. **Habeas Corpus** ⇐1

The ancient writ of "habeas corpus ad subjiciendum" serves the modern and noble purpose of providing a remedy for those whose conviction or incarceration was obtained outside the bounds of the law.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Habeas Corpus** ⇐45.1(4)

Habeas corpus petitioners were not denied full and fair hearings in state courts because of lack of money allotted to their use where the defendants were ready to present the allegedly necessary evidence in federal court despite the fact that they had received no more money in federal court than they had in state court.

3. **Criminal Law** ⇐1206(1)

The residue of discretion in the imposition of the death penalty left to prosecutors, juries, and judges under the Georgia statute is properly channeled by statute so as to eliminate caprice, and the automatic judicial supervision of fact-finding role assigned to the Georgia Supreme Court by statute provides sufficient mechanism by which the application of the aggravating circumstances by juries may be supervised and checked. Ga.Code, § 27-2537.

4. **Criminal Law** ⇐1206(1)

Proffered evidence that, under new Georgia death penalty statute, there were disparities in imposition of the death penalty based upon race, sex, and poverty would not show any infirmity in death penalty statute which were otherwise found to be acceptable under the Constitution. Ga. Code, § 27-2537.

5. **Jury** ⇐108

Exclusion for cause of jurors who voice general objections to the death penalty or conscientious or religious scruples against its infliction is not permissible; juror may properly be excluded if his avowals show unequivocally that he is disqualified either because he would automatically vote against imposition of capital punishment without regard to the evidence that might be developed at trial or because his attitude toward the death penalty would prevent him from making impartial decision as to the defendant's guilt.

6. **Jury** ⇐106

Order of testimony by veniremen that he could not pass judgment and condemn a person's death regardless of what the evidence showed sustained excusing the juror for cause.

7. **Jury** ⇐108

Jurors who expressed unambiguous opposition to the death penalty in their firm intention to vote against it regardless of what the evidence showed were properly excused.

8. **Jury** ⇐108

Veniremen who was asked whether his beliefs were such that he would refuse to even consider the imposition of capital punishment under any circumstances and who answered in the affirmative was properly excused.

9. **Jury** ⇐33(2.1)

Even if a "death qualified" jury is more likely to convict, a panel so constituted is not necessarily impartial.

10. **Criminal Law** ⇐1213

Infliction of death penalty by electrocution rather than by other methods is not cruel and unusual. U.S.C.A.Const.Amend. 8.

11. **Indictment and Information** ⇐113

There was no requirement that the specific aggravating circumstances used to justify capital sentence be set forth in the indictment; the aggravating circumstances are not elements of the offense. Ga.Code, § 27-2534.1.

12. **Grand Jury** ⇐17
Jury ⇐117

Challenge to jury array must be made when the array is put upon the defendant

and a challenge to a grand jury must be made before indictment; waiver will be imposed unless the challenges are timely

13. **Habeas Corpus** ⇐25.1(3, 4)

If the state has a valid rule of criminal procedure which requires the defendant to object to a grand or petit jury at a certain time, failure to make that objection may preclude consideration of the claim in federal court.

14. **Criminal Law** ⇐273.4(1)

Defendant's plea of guilty to charge of murder constituted a permanent waiver of constitutional infirmities preceding the entry of the plea unless it was shown that the plea was not voluntarily and intelligently entered.

15. **Habeas Corpus** ⇐25.1(4)

Habeas corpus petitioner whose challenge to jury was filed late and was abandoned on appeal had waived the claim.

16. **Habeas Corpus** ⇐25.1(6)

Trial counsel's inadvertence or ignorance was not a sufficient showing of cause to permit issue which was waived in the state courts to be presented in habeas corpus proceeding.

17. **Courts** ⇐90(2)

Rehearing of case on en banc stripped panel opinion of precedential value.

18. **Habeas Corpus** ⇐25.1(6)

Defendant whose attorney considered a jury challenge and elected not to pursue it because, in his opinion, the jury system in county had recently been revised and was constitutionally sound, and whose attorney believed that a challenge to the grand jury would have been futile and unnecessary did not show cause for failing to raise the issues in the state courts and thus could not assert them in a federal habeas corpus proceeding.

19. **Habeas Corpus** ⇐25.1(3, 4)

Fact that defendant was proceeding pro se, although he had a court-appointed attorney to use as a resource to advise him on the legal effect of various motions, did not show cause for failure to raise challenges to jury and grand jury in a timely manner in [illegible] federal habeas corpus proceeding.

20. **Habeas Corpus** ⇐45.5(11)

Evidence did not show that defendant received ineffective assistance of counsel because of counsel's asserted failure to interview all possible witnesses.

21. **Criminal Law** ⇐641.13(6)

Constitutional standard for effective assistance of counsel is not errorless counsel or counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance. court must inquire into the actual performance of counsel in conducting the defense and a determination of whether a reasonably effective assistance was rendered must be based on the totality of the circumstances and the entire record.

22. **Criminal Law** ⇐641.13(6)

Even if counsel did not interview all possible witnesses, counsel investigated the case to the point where he was familiar with the facts and the state's case provided reasonably effective assistance.

23. **Criminal Law** ⇐1206(1)

Death penalty was not unconstitutional on theory that it was groundless and irrational and failed to serve legitimate social interest.

24. **Criminal Law** ⇐1205

Retribution is not a constitutionally forbidden purpose for exacting death penalty.

25. **Habeas Corpus** ⇐92(1)

Federal habeas corpus court's determination of question of whether death penalty was excessive in the case in light of all the relevant mitigating factors was required to be made on the same record available to the state Supreme Court when it made that determination.

26. **Habeas Corpus** ⇐92(1)

Conclusion of state court that imposition of death penalty was not excessive in the case was binding on federal habeas court unless it could be shown to be deficient. 28 U.S.C.A. § 2254.

27. Criminal Law ⇐273.4(1)

Defendants knowing entry of plea of guilty waived any objection to nonjurisdictional constitutional deprivations which occurred prior to his plea, including the obtaining of statements in an unconstitutional manner, even though the statements were not used until the sentencing phase after the guilty plea.

28. Jury ⇐99(1)

Criminal defendant has a right to be tried by an impartial jury; impartial and indifferent jury need not be totally ignorant of the facts and issues involved.

29. Jury ⇐33(2)

Defendant must show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permitted an inference of actual prejudice in order to prove a violation of his right to an impartial jury which would rise to a constitutional level; he must demonstrate an actual and identifiable prejudice on the part of the jury members attributable to the publicity or else he must show that community prejudice actually infected the jury box.

30. Criminal Law ⇐121

Evidence that almost every juror had heard or read accounts of the case, that relatively few of the veniremen answered that they had a preconceived opinion about the case based on pretrial publicity, that the three persons who affirmed that they could not set that opinion aside were excused for cause, and that the only venireman who stated that a verdict of not guilty would cause repercussion upon his business or community life was excused for cause demonstrated that trial court was within its discretion in denying motion for change of venue.

31. Habeas Corpus ⇐85.5(13)

Evidence sustained finding that, despite witness' recantation, defendant's conviction was not based on perjured testimony.

32. Habeas Corpus ⇐30(1)

Defendant who did not present at the sentencing phase of his trial the claim that the death penalty was excessive because of the absence of any prior significant criminal record and because the defendant was a high-school graduate with good character and was not the person who actually shot the victim could not assert those claims as a basis for habeas corpus relief.

33. Habeas Corpus ⇐85.5(15)

Evidence sustained determination of state Supreme Court that imposition of death penalty on one involved in shooting death of police officer was not excessive.

34. Criminal Law ⇐330

Because defendant's state of mind at trial was not an element of the crime with which he was charged and he claimed only to have amnesia at the time of trial, burden of proof on that issue could be placed on defendant.

35. Criminal Law ⇐792(8)

Instruction which informed the jurors to construe inconsistent evidence against an implication of perjury did not impermissibly tell the jurors that they could ignore reasonable doubt which might develop because of conflicts in the evidence.

36. Criminal Law ⇐778(5)

Instruction that, when the state's evidence shows a commission of a homicide by the accused by the use of a deadly weapon, law presumes murder impermissibly changed the burden of proof.

37. Habeas Corpus ⇐30(1)

Error in giving instruction which shifted the burden of proof could be treated as harmless if it was shown to be harmless beyond a reasonable doubt.

38. Habeas Corpus ⇐30(1)

In view of overwhelming evidence of defendant's guilt, instruction which impermissibly changed the burden of proof by stating that the law presumes murder when a homicide is committed by the use of a deadly weapon was harmless.

Bobby L. Hill, Savannah, Ga., for Mitchell.

C. B. King, Albany, Ga., for Ross.

Edward D. Tolley, Athens, Ga., for Spencer.

John C. Boger, New York City, for petitioners.

Arthur K. Bolton, Atty. Gen., Atlanta, Ga., for Hopper.

William Hill, Asst. Atty. Gen., Atlanta, Ga., for Zant.

MEMORANDUM AND OPINION

BOWEN, District Judge.

These three suits petition the Court for relief in the nature of habeas corpus. They were filed separately *in forma pauperis* under 28 U.S.C. § 2254. Each petitioner was convicted of murder and is now under sentence of death by electrocution; each petitioner challenges the constitutionality both of his conviction and of the sentence im-

[1] Ga.Code Ann. §§ 27-2503, 27-2528 and 27-2534.1 read as follows:

27-2503. *Presentence hearings in felony cases.*

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and plea: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1 exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

27-2528. *Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death.*

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the

[2] [illegible] together at most phases of the litigation to conserve the time and resources of both the Court and of the parties. Consistent with this treatment, this memorandum will examine the three petitions in two stages: the common issues will be discussed together in one section, and the issues individual to each petition will be discussed separately in later sections.

I

A. *Legal History*

William "Billy" Mitchell entered a guilty plea to the charge of murder on November 5, 1974, before a judge of the Superior Court of Worth County, Georgia. A presentence trial was held as required by Georgia law. Ga.Code Ann. §§ 27-2503, 27-2528, 27-2534.1.[1] After imposition of the

sentence of death, the conviction was affirmed on direct appeal to the Georgia Supreme Court. Moore v. The State, 244 Ga. 190, 214 S.E.2d 900 (1975). Gacek, Jones and Moore filed petitions for writs of habeas corpus in the Superior Court of Butts County, Georgia, which were consolidated and denied after an evidentiary hearing. Gacek v. Hopper, 240 Ga. 190, 214 S.E.2d 900 (1975). Gacek, Jones and Moore then filed petitions for writs of habeas corpus in this court. Respondent has moved to dismiss the petitions on the ground that petitioners have failed to exhaust their state remedies.

indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking.

27-2534.1 *Mitigating and aggravating circumstances; death penalty.*

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which is found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

3. All three of the petitioners' direct appeals from convictions were considered by the Georgia Supreme Court in expedited appeals mandated by Ga.Code Ann. § 27-2537:

27-2537 *Review of death sentences.*

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b); and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

dissenting without opinion), *cert. denied* 428 U.S. 910, 96 S.Ct. 3224, 49 L.Ed.2d 1219 (1976). Petitioner then filed a petition for the writ of habeas corpus in the Superior Court of Tattnall County, Georgia. A hearing was held in January, 1977, after which Judge Paul E. Caswell denied the petition by order of April 6, 1977. This denial was affirmed in *Mitchell v. Hopper*, 239 Ga. 781, 239 S.E.2d 2 (1977), *cert. denied*, 435 U.S. 937, 98 S.Ct. 1513, 55 L.Ed.2d 534 (1978).

Willie X. Ross was convicted of armed robbery, kidnapping and murder after a jury trial in the Superior Court of Colquitt County, Georgia, on March 3, 1974. Sentences of life imprisonment, twenty years and death were imposed on June 26, 1974. The conviction and sentence were affirmed by the Georgia Supreme Court in *Ross v. The State*, 233 Ga. 361, 211 S.E.2d 356 (1974) (Gunter, J., dissenting without opinion), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1217 (1976). After a hearing in the Superior Court of Tattnall County, the petitioner's suit for state habeas corpus relief was denied by Judge Paul E. Caswell on March 22, 1977. This decision was affirmed in *Ross v. Hopper*, 240 Ga. 369, 240 S.E.2d 850 (1977), *cert. denied*, 435 U.S. 1018, 98 S.Ct. 1890, 56 L.Ed.2d 397 (1978).

James Lee Spencer was convicted of murder, aggravated assault and escape after a jury trial in the Superior Court of Richmond County, Georgia, in January, 1975. Sentences of death for the murder and ten years running concurrently on the other two charges were imposed. The convictions and sentences were affirmed by the Georgia Supreme Court on appeal. *Spencer v. The State*, 236 Ga. 697, 224 S.E.2d 910 (1976) (Gunter, J., dissenting without opinion), *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 302 (1976). An evidentiary hearing was held in the Superior Court of Tattnall County, Georgia, on Spencer's petition for state habeas corpus relief. This was denied by order of Judge James E. Findley on August 18, 1978. This denial was affirmed in *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1 (1979), *cert. denied*, 444 U.S. 985, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979).

Three hearings have been held before this Court. On January 26, 1981, a hearing was held in Savannah, Georgia, pursuant to notice to counsel and in accordance with 28 U.S.C. § 2254(d)[6] to determine the necessi-

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the Court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

6. 28 U.S.C. § 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determina-

ty for an evidentiary hearing. This first hearing was confined to the issues common to all three petitions. *See* Part II, below. The Court heard argument on the sufficiency of the record made in the courts of Georgia, the sufficiency of their findings of fact and allowed the petitioners to make offers of proof relating to evidence they would present at an evidentiary hearing. At the conclusion of this hearing, the Court announced its ruling as to the issues upon which evidence would be received, and the scope of the evidence permitted.[3] Evidence was taken at an evidentiary hearing the following day in accordance with this ruling.

The third hearing was held in Augusta, Georgia, to determine the necessity under 28 U.S.C. § 2254(d) for an evidentiary hearing on the individual issues raised in the three petitions. *See* Parts IIIA, IIIB and IIIC, below. Consistent with the procedure of the first hearing, the Court heard argument from counsel on the sufficiency of the record and the findings of fact made by the Georgia courts to determine the necessity for an additional evidentiary hearing. The Court has concluded that no further hearings are mandated except as noted below.

B. *The Crimes*

The Court here recites the facts surrounding the crimes of which the petitioners were accused and convicted. This section is not meant to add gloss to a proceeding which could be perceived as a dry, antiseptic legal exercise. To the contrary, an atmosphere of calm is crucial to the proper function of our system for dispensing justice. However, the following descriptions are included to provide necessary perspective about the business in which we are engaged.

[1] The ancient writ of *habeas corpus ad subjiciendum* serves the modern and noble purpose of providing a remedy for those whose conviction or incarceration was obtained outside the bounds of the law. *Fay v. Noia*, 372 U.S. 391, 399, 83 S.Ct. 822, 827, 9 L.Ed.2d 837 (1963).* The doctrine that no person may be illegally deprived of his liberty is a cornerstone of our legal system and of our society. However, during a proceeding to determine whether the

tion after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

3. This ruling was made from the bench and is set out in detail in Part II, below.

letter of the law has been followed in a criminal proceeding, the issue of the actual guilt or innocence of the defendant can be obscured by the examination of the legalities involved. This Court is not commenting here on the propriety of this obfuscation. Rather the Court deems it important and appropriate to remember that the source of our due process guarantees is the principle that no *innocent* person should ever be deprived of his liberty. The legalities examined by the courts in habeas proceedings were formulated to achieve this goal to the extent it is humanly possible.

The crimes for which these petitioners were convicted are not relevant to the existence *vel non* of constitutional infirmities in their trials and sentences. However, our criminal justice system works a delicate balance between the constitutionally protected liberty of the individual, and the interest of society as a whole in the efficient curtailment and punishment of crime. The following recitation[6] will emphasize the gravity of this balance here, for while the very lives of the petitioners are at stake, society has been grievously wronged as well by individual acts of premeditated and brutal violence.

William "Billy" Mitchell

On Sunday morning, August 11, 1974, at 7:00, Mrs. James Carr and her fourteen-year-old son Christopher opened I.G.A. Store Number 13, a convenience grocery store in Worth County, Georgia. About fifteen minutes later, while the two were preparing the store for the business day, Mitchell entered the store. He walked over to the soft drink cooler, then returned to the check-out counter near the door. There he confronted Mrs. Carr and Christopher, and demanded "all the money." This demand was repeated, and Mitchell produced a small pistol from his coat pocket, pointing it at Mrs. Carr from across the counter. She handed him about one hundred fifty dollars in bills from the cash register. Mitchell then demanded and received the money Mrs. Carr and her son had in their personal possession.

Mitchell then ordered the two to go to the back of the store. They were marched into the storage area in the rear at gunpoint, walking through a meat room to a door leading to a cooler. Christopher was carried into the cooler by Mitchell. He stepped back out, saying to Mrs. Carr, "I've never had a white bitch before," and shoved her towards the adjoining bathroom. When Mrs. Carr cried out, "Oh my God, no!" the petitioner ordered her into the cooler, and pushed her inside with her son. Both got on the floor, Christopher sitting and his mother squatting.

Facing her son (with Mitchell behind her) Mrs. Carr heard a shot and saw a red hole appear on her son's chest. Then, she felt a jolt and a burning sensation in her head. Mrs. Carr testified that she heard the petitioner leave the cooler, then return in a few minutes. She had slumped to the floor, and saw only the legs of the assailant. Christopher, now lying on the floor of the cooler, was shot again in the back of the head, and Mrs. Carr was shot three more times in the arms and back. The petitioner left the cooler again. Mrs. Carr was able to get up and go to a telephone which was by the door of the cooler. She called the police and an ambulance.

In the front of the store, two boys had entered to find Mitchell behind the counter. They were ordered to the rear. Mitchell pointed his gun at one and pulled the trigger several times, but it did not fire, apparently out of ammunition. Mitchell took about six dollars from one of the boys and marched them into the cooler with Mrs. Carr and Christopher. He again attempted to shoot one of the boys, and the gun again did not fire. Leaving his four prisoners, Mitchell closed the door to the cooler and left the store. The police arrived shortly

6. The facts set out here are drawn largely from the opinions published by the Georgia Supreme Court in the direct appeal of each petitioner. They are fully supported by the evidence given at trial, and the accuracy of these particular findings is not challenged. They are therefore binding upon the Court under 28 U.S.C. § 2254(d). *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

thereafter, and Mitchell was taken into custody a few hours later. Christopher was dead.[7]

Willie X. Ross

August 23, 1973, Willie X. Ross, Freddie Lee King, Rudy Turner and the petitioner's brother, Theodore Ross, planned to rob the Clover Farms Highway Grocery in Moultrie, Georgia. Pursuant to this plan, they drove to Moultrie from Madison, Florida, to stake out the store. When the store closed for the evening, the four followed the man who had closed the store to a nearby house in which J. R. Stanford and his family lived. They then returned to Madison.

The following evening, the four men returned to the Stanford home wearing stocking masks. Entering the house, they held the Stanford family at gunpoint while they ransacked their home. They collected money, jewelry and Mr. Stanford's .32 caliber pistol, then demanded the grocery store money. They were told that it was in the possession of Robert Lee, who lived nearby, and that Wendell Norman, Stanford's son-in-law and Lee's partner in the grocery store, would be returning to the Stanford home with his wife later that night. The four robbers waited, and when Norman and his wife arrived, Norman was overpowered and ordered to take Theodore Ross and King to the Lee house to get the money. Ross and King left with Norman and Stanford's fourteen-year-old stepdaughter, leaving the petitioner Ross and Turner with the Stanford family.

Theodore Ross, King, Norman and the girl arrived at the Lee residence, entered the home and proceeded to Lee's bedroom. Norman switched on the light, Lee awakened, and Norman informed him that Ross and King were there to get the money from the store. Lee reached for his pistol and began firing into the hallway at Ross and King. One of these two returned fire and grabbed one of the two small Lee boys present, threatening to kill the boy if Lee did not stop firing and hand over the money. Lee complied, and Norman handed King the cash box, which contained approximately $20,000.00 in cash and checks. When Ross and King fled on foot, Norman telephoned the police to inform them of the robbery and that the Stanford family was being held at gunpoint at their home.

Moultrie Police Lieutenant Tommie Meredith gallantly responded to the call, arriving at the Stanford home within a few minutes, with Officer Frank Lynch close behind in a separate car. Meredith entered the kitchen door armed with a shotgun, and confronted Turner, who was armed with a pistol, crouching at the opposite end of the dining room table. Ross, armed with Stanford's pistol, was positioned in front of a refrigerator located in the dining room. Turner said to Meredith, "I've got them right here," indicating the Stanford family and motioning for one of them to come to him. As words were exchanged between Meredith and Turner, the Stanfords fled to a bedroom.

Both Stanford and Lynch testified that two shotgun rounds were fired, followed by a single pistol shot. The petitioner and Turner ran from the house and through the back yard, Lynch firing at them as they fled.

Lynch found Meredith's body on the kitchen floor, shot through the chest at point blank range. Turner's pistol was found fully loaded in the back yard, and the cartridge in the firing chamber bore an indentation indicating it had misfired. The .32 caliber pistol, which had been in Ross' possession, was found next to the back-yard fence, one round having been fired. It was determined that Meredith had been killed with this weapon.

Shortly after this incident, the appellant told his brother Theodore, who testified for the state, that he had shot a policeman and that Turner's gun had misfired. Petitioner also told another witness, Bobby Gamble,

7. At this point, the reader may wish to note that one of Mitchell's claims of ineffective assistance of counsel rests on the fact that his lawyer made no attempt to offer to the sentencing court evidence of his (Mitchell's) alleged activities in helping the youth of his hometown, Jacksonville, Florida.

that he believed he had killed a policeman. Petitioner was apprehended several months later and indicted for the kidnapping of Wendell Norman, the armed robbery of Robert Lee, and for the murder of Lieutenant Tommie Meredith.

James Lee Spencer

On October 31, 1974, Chief Deputy Sheriff L. O. Beazley of Richmond County was assigned to transport a prisoner, the petitioner, from the Richmond County Jail to the Georgia State Prison in Reidsville, Georgia. He picked up Spencer at the jail at 9:45 in the morning and placed him in the back seat of the transfer vehicle. A heavy wire mesh separated the front seat of the car from the back seat. Then Beazley picked up his father-in-law, Lett Williams, who was to accompany Beazley on the trip to Reidsville and back.

Beazley had left Augusta and was driving toward Millen, Georgia. The radio dispatcher reported, "Chief, the passenger you've got is supposed to have a gun." At that point, the petitioner shot Beazley three times. Beazley stopped the car and was shot in the head as he attempted to unlatch the door. This shot blinded him. Beazley managed to get the passenger door open, pushed his father-in-law out and crawled out himself.

Leslie Padgett was traveling on the Millen Highway about 10:15 when he saw a car stopped in the right lane. An elderly man stood at the rear of the automobile calling for help. As Padgett was getting his pistol, the old man, Mr. Williams, ran over to the car and put his head inside the window. One shot was fired by the petitioner. It hit Williams in the head from point blank range. Petitioner then kicked out a window of the rear compartment and climbed out of the car. Fortunately, he was apprehended by a state patrolman as he attempted to flee.

Mr. Williams died of the head wound he sustained. Deputy Beazley lives, but is permanently blind in his left eye.

There was evidence that Spencer had planned his escape several days in advance. Thomas Yancey, a former prisoner at the Richmond County Jail, testified that he and Spencer had discussed escaping. The day Spencer was to be transferred to Reidsville, Yancey saw him strap a pistol to his leg, then cover it with his sock. Yancey also testified that as Spencer passed him on the way out that morning, he said, "This here is the day." J. B. Dykes of the Richmond County Sheriff's Department testified that the petitioner had a homemade handcuff key concealed in his mouth on the day of the escape attempt. The key was recovered when the petitioner spit it into an officer's hand at an Augusta hospital.

II. THE COMMON ISSUES

These three petitions each present seven issues which are substantially identical. All, of course, claim constitutional deprivations which depend on the facts unique to each case. However, the facts pertinent to each alleged violation do not vary substantively among the three petitions, and the legal analysis by which they must be examined is identical. Accordingly, these issues have been treated together by the Court, and will be examined together here for purposes of economy. The issues are:

(1) whether the death penalty is being imposed in an arbitrary and discriminatory matter in the State of Georgia;

(2) whether the death penalty is being imposed pursuant to a pattern and practice of discrimination based upon race, sex and poverty;

(3) whether the systematic exclusion for cause from the petitioners' juries, at the guilt phase of their trials, of prospective jurors with conscientious or religious scruples against the death penalty resulted in juries which were not comprised from a representative cross-section of the community and which were biased against petitioners in resolving questions of guilt or innocence [Spencer and Ross only];

(4) whether the appellate sentencing review procedures followed by the Supreme Court of Georgia suffice to

meet sixth and eighth amendment standards for review of capital cases;

(5) whether electrocution as a means of capital punishment is unnecessarily cruel and torturous;

(6) whether the failure by the state to give notice prior to trial of the aggravating circumstances necessary for imposition of the death penalty denied the petitioners' due process of law;

(7) whether the grand and petit juries placed upon the petitioners were unconstitutionally composed.

Extensive findings of fact were made in the courts of Georgia on all the issues in these three cases, and after extensive hearings; the combined records fill an entire drawer of a legal-size filing cabinet. It has been the consistent stance of the respondent that no further evidence need be taken in these cases, that the record is sufficient to compel a determination on all the issues where the facts, rather than legal precedent, are controlling. The petitioners, of course, maintain otherwise.

The Court heard argument from the parties in Savannah, Georgia, on January 26, 1981, on the applicability in these cases of the presumption of correctness created by 28 U.S.C. § 2254(d). *See* footnote 4, above. A review of the record and the various findings of fact made by the Georgia Supreme Court and the superior courts hearing the state post-conviction petitions reveals that these findings are, on their face, entitled to this presumption of correctness; the record is extensive, none of the proscriptions enumerated in section 2254(d)(1) through (7) appear to have been violated, and the findings are fairly supported by the evidence. In light of this preliminary appearance, the Court deemed it the responsibility of the petitioners to make an offer of proof which could override this presumption before a full evidentiary hearing would be necessitated.

[2] The petitioners argued that the hearings below were not full and fair hearings because they were not allowed to fully develop the pertinent facts. They contend that this occurred because the state denied motions made in all three cases for money to be allotted to the use of the indigent petitioners for the gathering and presentation of evidence on the first two issues enumerated above.

Two factors require this argument to fail. The first is that the record actually contains facts sufficient to uphold a determination on the issues, with the exceptions noted below. This is so especially in light of precedent which controls most of the issues. The United States Court of Appeals for the Fifth Circuit in *Spenkelink v. Wainwright*,[8] 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), *rehearing denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979)[9] considered issues substantially identical to most of those raised here. As discussed below, the holding in that case severely limits the type of evidence which would be relevant here.

Secondly, the petitioners come prepared to present the same or similar evidence they claimed they could not present at the state level, and do this despite the denial of a similar request for money in this Court. Petitioners were represented at the state habeas corpus hearings by the same counsel who represent them here. While the issue need not be reviewed in detail in light of the conclusions mandated by the *Spenkelink* case, the Court will note that the fact of petitioner's ability to present evidence here when faced with the same purported lack of funds they faced during state proceedings casts the failure to present that evidence in the courts of Georgia in the light of strate-

8. The correct spelling of Spenkelink's name is with one "l", 578 F.2d 582, n.1. That spelling is used here.

9. Authority of the United States Court of Appeals for the Fifth Circuit decided prior to October 1, 1981, is binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

gic default.[9] It is the Court's determination that the refusal by the state of Georgia to provide funds for the use of the petitioners in their state suits did not affect the adequacy of their hearings.

A. *Arbitrary and discriminatory imposition of the death penalty*

The petitioners allege that the death penalty in Georgia is being imposed in an arbitrary and discriminatory fashion. They assert that the Georgia death penalty statutes designed to eliminate capriciousness in the imposition of capital punishment do not, in fact, accomplish this goal. In support of this allegation, the petitioners offered evidence which they asserted would show that the death penalty is disproportionately imposed when considering factors such as the race of the defendant, the race of the victim and the locality of the crime. This evidence was offered in the form of statistical studies and proposed testimony of various social scientists to demonstrate discrimination as well as the ineffectiveness of the present statutes in correctly channeling the discretion of prosecutors, juries and judges.

The respondent rebuts on two levels. Construed as a selective prosecution claim, he asserts that the petitioners have not satisfied the two-prong test that (1) others similarly situated have not been prosecuted, or (2) that the government's prosecution of the petitioners is selectively invidious or based upon impermissible considerations such as race, religion or the exercise of some constitutional right. *See United States v. Hayes*, 589 F.2d 811, 819 (5th Cir. 1979), *cert. denied*, 444 U.S. 847, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979). Second, the respondent asserts that the claim is disposed of by the *Spenkelink* decision.

The Court disagrees with the respondent's characterization of the petitioners' claim as one of selective prosecution. The allegation is not that [illegible] did that the petitioners were individually singled out on the basis of race, sex or poverty, but rather that the statutory system employed by the Georgia courts to impose the death penalty does not control the discretion of prosecutors, judges and juries sufficiently to prevent the capricious and arbitrary imposition of this sanction disproportionately upon groups of which the petitioners are members. However, the Court agrees that the argument is controlled by judicial precedent.

Georgia's death penalty statutes were framed as they now exist in response to the United States Supreme Court's judgment in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Concern was expressed there that the penalty could be imposed by courts and juries in Georgia without significant guidance, and therefore capriciously and arbitrarily. *See Furman v. Georgia*, 408 U.S. at 313, 92 S.Ct. at 2764 (White, J., concurring). The present statutory scheme was designed to remove caprice from the system by affording guidance to the sentencing body, whether jury or judge. This system was given *prima facie* approval by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976).

Petitioners assert, as did the petitioner in *Gregg v. Georgia*, 428 U.S. at 198, 96 S.Ct. at 2936 that the new statutory scheme in Georgia only appears to have removed caprice from the system, that in fact the arbitrariness and discrimination condemned by *Furman* persist, and that the holding of *Gregg* creates only a rebuttable presumption that the revised statutes are constitutionally sound.

[3] The Court disagrees with this interpretation of *Gregg*. In that case, the Supreme Court examined and rejected argu-

9. A strategy involving a failure to present evidence at a state hearing conceivably could be utilized to preserve the opportunity for a full hearing under section 2254(d) in the federal courts. No evidence to imply the petitioners have attempted this is before the Court, nor is a conclusion to this effect required. Such a strategy could, however, have a serious impact upon a petition in this Court, for this Court and the law would require its examination as a deliberate bypass of an available state remedy, which could work as a waiver of the issue. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

ments raised here by the petitioners. *Gregg* specifically holds that the residue of discretion in the imposition of the death penalty necessarily left to prosecutors, juries and judges is properly channeled by the statutes so as to eliminate caprice. 428 U.S. at 199, 96 S.Ct. at 2937. Further, the Court held that the automatic judicial supervision and fact-finding role assigned to the Georgia Supreme Court by Ga.Code Ann. § 27-2537 provides the mechanism by which the application of the aggravating circumstances by juries necessary for imposition of a death sentence may be supervised and checked. 428 U.S. at 206–204, 96 S.Ct. at 2937–40. *Gregg* holds, in short, that the caprice and arbitrariness proscribed in *Furman* have been conclusively removed from capital cases under the revised statutes, and that defendants properly tried and sentenced under that statute have been visited no constitutional violation. 428 U.S. at 206–207, 96 S.Ct. at 2940–41.

The United States Court of Appeals for the Fifth Circuit supports this interpretation in *Spenkelink v. Wainwright*, *supra*. Speaking of the *Gregg* decision and the other death penalty cases considered by the Supreme Court in the same term, the Fifth Circuit court opined:

> We understand these decisions to hold that capital punishment is not unconstitutional *per se*, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute—and there can be no doubt that Florida has—which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capri-

11. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), is not to the contrary. In that case, the Supreme Court reversed the imposition of the death penalty in a Georgia court. The holding does not look behind the Georgia death penalty statutes, however, to determine any issue about the inherent caprice vel non of those laws. Rather, it reiterates the language of *Gregg* that the Georgia courtless constitution v. *Furman* has been conclusively rejected.

582 F.2d at 940.[11] There can be no doubt, similarly, that Georgia has such a properly drawn statute as well. *Smith v. Balkcom*, 660 F.2d 573, 584–86 (5th Cir. 1981).

[4] The petitioners' statistical evidence as proffered, and the evidence presented in the state courts of Georgia, do not override this finding. They would show that sentencing patterns under the new statute still reveal glaring disparities in the imposition of the death penalty based upon race, sex and poverty. This allegation may be true, and, if so, would be sad and distressing, but the allegation does not alone show any infirmity in a statute otherwise found to be acceptable under the Constitution. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Spenkelink*, *supra*, 612–616.

Of course, a petitioner may show specific acts of invidious discrimination which would invalidate a conviction and death sentence. *Spenkelink*, *supra*, 578 F.2d 616 n. 40, but the petitioners' proffered evidence does not show this, nor are any acts of individual discrimination alleged by any of the three petitioners.

Similarly, the petitioners could show that their convictions and sentences were imposed outside the limits set by Georgia law, that the statutes were not followed for some reason or that the courts were derelict in their duties. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Again, no petitioner alleges this, nor does such appear to be the case from the record in these suits.

The Court must conclude that the first two issues have been effectively foreclosed to the petitioners by judicial decisions in

> Supreme Court must direct the discretion of juries in its interpretation of the meaning and applicability of the death penalty statutes. It was determined in *Godfrey* that the Georgia Supreme Court had failed in this duty as to the individual petitioner there; a failure of the statutory system was not found or implicated. *See Smith v. Balkcom*, 660 F.2d at 584–85.

Griggs v. *Georgia*, *Spinkellink* v. *Wainwright*, and *Smith* v. *Balkcom*. Similarly, the Court finds that the issue regarding an allegedly infirm system of appellate review of death cases is foreclosed by these decisions as well.

B. *The Witherspoon Issues*

Petitioners Ross and Spencer challenge the exclusion for cause of jurors who expressed opposition to the death penalty under the holding of *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). That case states that a defendant's sixth amendment right to an impartial jury is violated when the trial jury was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty, or expressed conscientious or religious scruples against its infliction. The challenge is on two fronts. The exclusion for cause of several jurors is directly challenged. Secondly, petitioners seek to expand the *Witherspoon* holding to proscribe as partial juries composed largely of those without conscientious or religious scruples against the death penalty. Petitioners cite their proffered evidence, scientific studies, which indicates that such juries are prosecution prone.

[5, 6] *Witherspoon* bans the exclusion for cause of jurors who voice general objections to the death penalty, or conscientious or religious scruples against its infliction. 391 U.S. at 522, 88 S.Ct. at 1776. This ban does not prevent a state from excluding for cause:

> [T]hose who make unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

391 U.S. at 522 n.21, 88 S.Ct. at 1776 n.21. The courts demand strict adherence to these guidelines; a juror may be properly excluded under *Witherspoon* only if his answers show unequivocally that he is irrevocably under at least one of the disqualifying circumstances. *Estelle*, 655 F.2d 673, 677, 74-5 (5th Cir. 1981); *Burns* v. *Estelle*, 626 F.2d 396, 397-98 (5th Cir. 1980) (en banc). The Court is concerned here with the testimony of one prospective juror in the trial of Ross, and three in the trial of Spencer.

Venireman Barker was questioned by the judge in Ross' trial. The dialogue consisted of the following:

> THE COURT: Let me ask you this, Mr. Barker. If you were selected as a juror in this case, would you be guided by the law as given you in Charge by the Court as to the alternate penalties that may be assessed, should the defendant be found guilty, and consider all of those alternatives?
>
> MR. BARKER: I could not condemn anyone to death. I believe that God gives life and its a precious life and I don't have the right to take it.
>
> THE COURT: The question was asked you earlier during the statutory voir dire questions, if you were conscientiously opposed to capital punishment.
>
> MR. BARKER: Yes.
>
> THE COURT: Would this opinion that you have as to capital punishment prevent you from assessing the death penalty regardless of what the evidence showed?
>
> MR. BARKER: I could not pass judgment and condemn him to death, no, sir.
>
> MR. COLE: We challenge the juror for cause.
>
> THE COURT: Are you stating to the court that regardless of what the evidence is in this case, what the evidence may show, that you still would refuse to impose the death penalty?
>
> MR. BARKER: Yes.

(Ross Trial Tr., p. 57-58). This colloquy very clearly shows that the venireman would automatically vote against imposition of the death penalty regardless of what the evidence might have shown at trial. There was no constitutional error in excusing this juror for cause. *See Burns* v. *Estelle*, 626 F.2d at 398.

[7] Two veniremen at Spencer's trial made their opposition to the death penalty similarly unambiguous. Mr. Harden was questioned as follows:

Q. Yes sir. Now, let me ask the question again. Are you in any way opposed or are you conscientiously opposed to the infliction of the death penalty?

A. Do I oppose it?

Q. Yes sir.

A. I do.

Q. You're opposed to the death penalty?

A. I do.

Q. Are you—is your opposition to the death penalty such that you don't feel like you could vote to impose it under any circumstances?

A. Do I feel that I would not oppose it?

Q. That you would not vote to impose it, that you wouldn't bring a death verdict under any circumstances?

A. Oh, I wouldn't—I wouldn't vote that.

Q. Regardless of how the evidence turned out, you wouldn't vote the death penalty?

A. No, I wouldn't.

(Spencer Trial Tr., p. 377–78). Juror Martin testified:

Q. Are you opposed to capital punishment—conscientiously opposed to capital punishment?

A. Yes sir.

Q. Is your reservation about capital punishment such that you would not—it would keep you from making an impartial decision in this case as to the defendant's guilt?

A. (No response)

Q. You could decide this case whether or not the defendant's guilty.

A. If he was guilty.

Q. regardless of what you believe in about capital punishment?

A. No sir.

Q. Your reservations about capital punishment are such that you could never vote to impose the death penalty, is that correct?

A. Yes sir.

(Spencer Trial Tr., p. 386). Both of these jurors expressed unambiguous opposition to the imposition of the death penalty, and their firm intention to vote against it regardless of what the evidence showed. They were properly excused under *Witherspoon*.

This same clear lack of ambiguity is not present in the statement of the third juror so excused in Spencer's trial. Mr. Kinnard testified:

Q. Are you conscientiously opposed to capital punishment?

A. Yes.

Q. Now, Mr. Kinnard, would your reservations about capital punishment prevent you from making an impartial decision as to the defendant's guilt in this case?

A. It's quite possible.

Q. Your reservations about capital punishment, then, are such that you would never vote to impose the death penalty, is that correct to say?

A. I've never faced it, but I believe that would be true.

Q. That you would not under any circumstances vote the death penalty?

A. I believe so.

Q. Are your reservations about capital punishment such that you would refuse to even consider its imposition in the case before you under any circumstances?

A. Yes.

(Spencer Trial Tr., p. 220–21). Mr. Kinnard's statement leaves no doubt about his opposition to the death penalty.

This opposition is not the test, however. The Court of Appeals for the Fifth Circuit has found a juror similarly opposed to the death penalty still to have been prematurely excused, not because her conscientious beliefs were in doubt, but because ambiguity remained as to how this would affect her deliberations as a juror. *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc); *see*

and Grandison v. Estelle, 655 F.2d 673, 676 (5th Cir. 1981). In Burns the colloquy was as follows:

Q. [By the prosecutor] All right. Let me ask you this question, a sentence of life imprisonment or death is mandatory on conviction of a capital penalty case, you understand that?

A. Yes, sir, I understand it.

Q. All right. And this is a capital felony case.

A. I don't believe in it.

Q. Ma'am?

A. I do not believe in it.

Q. Let me go into it then. You told me just then that you did not believe in death?

A. That's right.

Q. All right. Then will the mandatory penalty of death or imprisonment for life affect your deliberation on any issue of fact, which what you just told me it will, in other words the mandatory penalty of death or imprisonment for life will affect the deliberations on any issue of fact in this case, is that correct?

A. That's right.

MR. GREEN: All right. Judge, we ask this juror be excused.

626 F.2d at 397 n.2. The court there held that these expressions, strong though they were, did not go far enough to warrant the juror's exclusion under the two-pronged test of *Witherspoon*.

[8] Mr. Kinnard's expressions appear at first to be less strong than those of Mrs. Doss, the juror in *Burns*; where she answered affirmatively to initial inquiries, Mr. Kinnard indicates "It's quite possible" and "I believe so." However, the record leaves no doubt that both jurors harbor strong beliefs in opposition to the death penalty. The crucial question asks how those beliefs will affect their deliberations. Mrs. Doss affirmed only that her beliefs would affect her deliberations, not that they would prevent her from performing her duties. Mr. Kinnard was asked a different question. The query put to him was whether his beliefs were such that he would refuse to [illegible] guilty in this case, and accordingly [illegible] the exclusion of Mr. Kinnard proper under *Witherspoon*.

[9] The petitioners next assert that the exclusion for cause of jurors such as Mr. Kinnard results in a trial by a "death-qualified" and prosecution-prone jury in violation of the guarantee by the sixth and fourteenth amendments of an impartial panel. Examining the identical issue, the court in *Spinkellink* rejected the conclusion implicit in petitioner's proffered evidence, that a panel so constituted is necessarily a partial one. Assuming, *arguendo*, the truth of the allegation of prosecution-proneness, that court said:

> That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant.

578 F.2d at 384. The record in *Spinkellink* revealed that, other than a willingness to impose the death sentence if the evidence required it, no juror not excluded for cause expressed any partiality to either side, nor, significantly, any reluctance to acquit. The record here reveals the same. Noting that the state also enjoys the right to impartiality, the court went on to say:

> [I]mpartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution.

578 F.2d at 386. The court concluded:

> The jury that emerges after excluding such veniremen, having been carefully examined to exclude also for cause those veniremen who are biased against the defendant, either as to guilt or as to punishment, is impartial. To call it prosecution-prone is to misunderstand the meaning of impartiality.

Id. This Court has found the exhaustive examination of the issue, 578 F.2d at 910-16, to be persuasive, and has excluded the petitioner's proffered evidence as a result. More importantly, the holding by the *Spenkelink* court is binding authority. *Accord, Smith v. Balkcom*, 660 F.2d at 575-585. The allegation of these petitioners must fail under these rulings.

C. *Infliction of the Death Penalty by Electrocution*

[10] The next issue common to all three petitions is the contention that the means of imposition of the death sentence in Georgia is cruel and unusual within the meaning of the prohibition of the Eighth Amendment. Georgia law provides that those who receive the death penalty shall be executed by electrocution. Ga.Code Ann. § 27-2512. In support of this position they have made an offer to produce evidence showing that this method of execution is unnecessarily tortuous and painful, especially when compared to presently available alternatives such as lethal injection.

This issue was examined and rejected by the Court in *Spenkelink*, relying on the decision of the Supreme Court in *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). *Spenkelink*, 578 F.2d at 616. The holdings of the *Spenkelink* court, rejecting the contention identical to the one at bar, requires the same conclusion here. The allegation is without merit.

D. *Notice of Aggravating Circumstances*

[11] The petitioners allege that they were not given timely notice of the specific aggravating circumstances that were used to justify the capital sentence each received under Georgia Code Annotated § 27-2534.1 because these aggravating circumstances were not alleged in their indictments. Briefly, there is no Georgia law, statutory or decisional, which requires the indictment to list the aggravating circumstances upon which a defendant accused of murder can be later sentenced to death. The crime these three petitioners were accused of was murder. The aggravation listed in section 27-2534.1 determines whether a murder conviction is the sort for which death may be exacted; the statutory aggravating circumstances are not elements of the crime. This allegation is without merit. *Spenkelink*, 578 F.2d at 909-10; *Blankenship v. State*, 247 Ga. 590, 594, 277 S.E.2d 665 (1981); *Bowden v. Zant*, 244 Ga. 250, 253-54, 260 S.E.2d 468 (1979), *cert. denied*, 444 U.S. 1108, 100 S.Ct. 1068, 62 L.Ed.2d 788 (1980); *Smith v. State*, 236 Ga. 12, 20, 222 S.E.2d 308 (1976), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3224, 49 L.Ed.2d 1219 (1976); *Eberheart v. State*, 232 Ga. 247, 253-54, 206 S.E.2d 12 (1974), *remanded for resentencing*, 438 U.S. 917, 97 S.Ct. 2994, 52 L.Ed.2d 1104 (1977).

E. *The Jury Challenges*

All three petitioners raise issues concerning the allegedly unconstitutional composition of grand or petit juries. These are treated as common issues because they are resolved by the same legal analysis.

[12] This analysis begins with the Georgia law concerning challenges to grand and petit juries. The Georgia Code relating to habeas corpus petitions states, in pertinent part:

> Except for objections relating to the composition of grand or petit jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or travers jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

Ga.Code Ann. § 50-127(1). This waiver will be imposed unless the challenges are

timely. A challenge to an array must be made when the array is put upon the defendant. Ga.Code Ann. §§ 59-802, 803. *Young v. State*, 232 Ga. 285, 206 S.E.2d 439 (1974). *Farley v. State*, 135 Ga.App. 198, 270 S.E.2d 361 (1980), and a challenge to a grand jury must be made even before indictment. *Durham v. State*, 239 Ga. 697, 239 S.E.2d 334, 336 (1977). *See Stewart v. Richetta*, 451 F.Supp. 911, 914 (M.D.Ga. 1978).

[13] If the state has a valid rule of criminal procedure which requires the defendant to object to a grand or petit jury at a certain time, failure to make this objection may preclude consideration of the claim in federal court. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Under these Supreme Court holdings, a petitioner must demonstrate cause for a procedural default and actual prejudice from the error before a federal court may grant relief under 28 U.S.C. § 2254. This Court's responsibility, then, must first be to determine whether a default has occurred. The record in these cases here makes it abundantly clear that such a default must be overcome by all three petitioners.

[14] Billy Mitchell did not voice a challenge to his grand jury until his state habeas corpus proceeding. Under Georgia Code Annotated § 50-127(1), this constitutes a waiver. Additionally, he entered a plea of guilty to the charge of murder. This plea constitutes a permanent waiver of constitutional infirmities which precede the entry of the plea unless it is shown the plea was not voluntarily and intelligently entered. *Tollett v. Henderson*, 411 U.S. 258, 266-67, 93 S.Ct. 1602, 1607-08, 36 L.Ed.2d 235 (1973). This waiver may be overcome by showing he pleaded guilty on advice not "within the range of competence demanded of attorneys in criminal cases." *Id.* The Court's conclusion in a later section of this opinion that he was afforded effective assistance during this phase precludes Mitchell from escaping this consequence of his guilty plea.

Petitioner Ross [illegible] [illegible] until the trials had begun [illegible] Section 50-127(1) requires a motion to [illegible] as well.

James Spencer's challenge is subjected to lengthy and detailed examination by the Georgia Supreme Court, *Spencer v. Hopper*, 243 Ga. 532 at 533-37, 255 S.E.2d 1, after which that Court found that Spencer's challenge was not timely filed, was not supported by the presentation of evidence, was waived before the trial began and was not revived on appeal. 243 Ga. at 536-37, 255 S.E.2d 1. This is a finding of three independent procedural defaults: untimely filing of the challenge, waiver of the challenge by failure to support it with evidence and by a positive relinquishment of it by Spencer's counsel, and waiver by failure to argue the challenge on direct appeal. Only the second conclusion warrants discussion here; the first and third are well supported by the evidence and are binding on this Court.

[15] Immediately prior to the beginning of trial, Spencer was asked by the prosecutor if he insisted upon his jury challenge and a motion for change of venue. Spencer's attorney, John Ruffin, replied that he was under the impression that the motions had been disposed of, and the trial judge agreed. The prosecutor then asked, "May I inquire as to whether or not the accused insists on them?" Speaking for his client, Mr. Ruffin replied, "Not while I'm under the impression that they have been disposed of." (Tr. p. 609). The Georgia courts have interpreted Mr. Ruffin's remark (and Spencer's silence after it) as an expression of satisfaction with the jury which included several blacks. 243 Ga. 536, 536 n.4, 255 S.E.2d 1. While Mr. Ruffin's rather cryptic statement might be read to imply a waiver, the statement seems to express, when taken at face value, the simple idea that counsel was not going to belabor a motion he felt had been ruled on. Mr. Ruffin's testimony before this Court reinforces this point. The Georgia Supreme Court examined two pages of transcript missing from this Court's copy, and concluded that, indeed,

the motions had been ruled on. 240 Ga. at 536 n.3, 235 S.E.2d 1. To insist on a motion which had already been overruled would be futile, and Mr. Ruffin's statement apparently reflects that logic. Given the ambiguity of Mr. Ruffin's remark, this Court, however, does not reject the Georgia court's conclusion of waiver. The Court instead finds that it is unnecessary to resolve the question one way or another. Lack of a waiver would not salvage Spencer's jury challenge. The facts remain that the challenge was filed late and was abandoned on appeal. These independent procedural defaults require the application to Spencer of the requirements imposed in *Francis v. Henderson*, supra.

All three petitioners must therefore demonstrate cause and actual prejudice resulting from the error they allege. The Court's determination that none of them can demonstrate sufficient cause precludes examination of any prejudice.

[16, 17] On January 27, 1981, this Court held an evidentiary hearing to allow the petitioners to show, among other things, the cause and prejudice required by *Wainwright v. Sykes* and *Francis v. Henderson*. No evidence was introduced to show the cause of any of the various defaults involved. Relying on the record, counsel argued on behalf of Ross and Mitchell that trial counsel's inadvertence or ignorance is a sufficient showing of cause. *Tyler v. Phelps*, 622 F.2d 172, 177 (5th Cir. 1980) is cited in support of this proposition. This assertion must fail, even ignoring the fact that, at least for Ross, this inadvertence or ignorance was never demonstrated outside the assertions of his counsel. *Tyler v. Phelps* would support the proposition for which it is cited, except that the case has been reheard en banc. This strips the opinion of any precedential value. *U. S. v. Michael*, 645 F.2d 252, 256 n.2 (5th Cir. 1981) (en banc), *cert. denied*, — U.S. —, 102 S.Ct. 489, 70 L.Ed.2d 257 (1981).

After rehearing, the Court declined to follow the panel holding that a trial counsel's ignorance or inadvertence is sufficient "cause" under *Wainwright v. Sykes*. *Tyler v. Phelps*, 645 F.2d 1267, 1270-71 (5th Cir. 1981) (en banc). While the *Tyler* opinion does not hold the opposite, a short time later, in *Washington v. Estelle*, 648 F.2d 278, 279 (5th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981), the Court of Appeals squarely holds that an allegation of ineffective assistance of counsel does not alone suffice to demonstrate "cause" under *Sykes*. 648 F.2d at 279.

The logic behind this holding is clearly stated. Quoting an earlier holding, the *Washington* court said:

> [P]etitioner has not demonstrated cause for his failing to make a timely challenge. His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction.

648 F.2d at 279, quoting *Lumpkin v. Ricketts*, 551 F.2d 660, 668 (5th Cir. 1977), *cert. denied* 434 U.S. 967, 98 S.Ct. 488, 54 L.Ed.2d 316 (1977). The logic is even more compelling when applied to an inadvertent default which falls short of ineffective assistance. Without even the necessity of showing his counsel's assistance was not constitutionally sufficient, a petitioner could cure any default by merely showing his attorney overlooked a particular point, or forgot to file a particular motion, or simply neglected to pursue a particular strategy because he was too busy. The destructive impact of a holding sanctioning this ability is obvious. This Court accordingly reads *Washington* to repudiate mere inadvertence as well as mere ineffective assistance of counsel as sufficient "cause" to overcome a default under *Wainwright v. Sykes*.

[18] Supposing then that Ross had shown that his default was the result of inadvertence, his petition must still fail on this point. Similarly, Mitchell's attorney has testified that he actively considered a

jury challenge and elected not to pursue one because in his opinion the jury system in Worth County, which had been recently revised, was constitutionally sound, and that a challenge to the grand jury would have been futile and unnecessary. (Habeas Tr. pp. 18–19; deposition of Clarence Miller, pp. 51–52). His election was an informed decision of trial strategy, deliberately made. This is not "cause" either, and may, in fact, be characterized as a deliberate bypass of an available state remedy under *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). *See Tyler v. Phelps*, 643 F.2d at 1101. Additionally, Mitchell's jury challenge is defeated by the waiver effect of his guilty plea. *Tollett v. Henderson*, *supra*.

[19] Spencer has similarly made no showing of cause. His silence on the subject at the hearings before this Court requires reliance on the record for evidence of cause. The record offers no support for the petitioner in this regard. Spencer filed his challenges late. For cause he must rely on his right to represent himself and his ignorance of the law requiring timely challenges to juries. However, while he may have had the right to file *pro se* motions, he also had a court appointed attorney to use as a resource to advise him on the legal effect of these motions. That he declined to do so and effectuated a procedural default as a result is "inadvertence" in the sense discussed above. This Court will not regard it as sufficient cause. Additionally, the challenge, timely or not, was not pursued on appeal. In the absence of any proffered reason for this, the Court need not go so far as to label it a purposeful relinquishment of the issue, but certainly the petitioner's silence on the issue is, at the least, a failure to uphold the burden placed on him by *Wainwright v. Sykes*.

None of these petitioners have demonstrated cause sufficient under *Wainwright v. Sykes* to alleviate them of the procedural defaults incurred with regard to their jury challenges. An independent review of the evidence does not show that any of the three can do so. Such a showing is a prerequisite to this Court's ability to examine the issue formerly abandoned. Failing this showing, there is no need to review the issue of whether actual prejudice has inured to the petitioners. No relief can be granted to any of the three on this issue.

III. THE INDIVIDUAL ISSUES

A. *William "Billy" Mitchell*

This petitioner raises four remaining grounds which allegedly render his conviction unconstitutional. He asserts: (1) his court appointed attorney rendered ineffective assistance; 2) the insufficiency of justifications for capital punishment; 3) the imposition of the death penalty was inappropriate in his case; and 4) the improper admission into evidence at his sentencing hearing of coerced statements.

1) Ineffective Assistance of Counsel

Mitchell alleges he was denied his right to counsel guaranteed by the Sixth and Fourteenth Amendments by ineffective assistance of his court appointed counsel at both the guilt and the sentencing phases of his trial. He alleges his counsel, Clarence Miller, failed adequately to investigate the facts of the case, did not obtain and review petitioner's statements given to police, did not investigate or press legal defenses available to Mitchell, and did not present evidences or witnesses to show mitigating circumstances at Mitchell's sentencing hearing.

These allegations were the subject of a lengthy hearing in the Superior Court of Tattnall County, Georgia. Subsequent to that hearing, the Superior Court made detailed findings of fact.

Petitioner's trial attorney was appointed to represent Petitioner on August 12, 1974, the murder had been committed on August 11, 1974. (H.C.T. 11, 23). The attorney testified that the practice of criminal law comprised between one-fourth to one-third of his general practice. (H.C.T. 10). He had represented criminal defendants in over 100 cases, including 30 murder cases, in the seven years he had been a member of the Geor-

gia bar. (H.C.T. 22). He estimated that he met with Petitioner on four to five occasions for rather lengthy interviews. (H.C.T. 21). He personally participated in the lineup identification of Petitioner, including selecting the other participants, shortly after Petitioner's arrest. (H.C.T. 24). He interviewed the witnesses, particularly the officers involved in taking Petitioner's statement. (H.C.T. 28). He was able to see the real evidence held by the State, including the pistols used in the murder. (H.C.T. 26). All evidence was readily accessible to him. (H.C.T. 26).

This Court finds that Petitioner's trial attorney had ample time to prepare to defend his client, that he did in fact fully investigate the facts surrounding the murder, that he had lengthy discussions with his client on at least four occasions, that he made an effort to effect a plea bargain with the district attorney, that he fully advised his client of the alternative courses of action available, and that he adequately assisted Petitioner in order to allow him to make an informed decision to plead guilty.

Resp. Ex. 3, pp. 9–10. These findings are fairly supported by the record. They are, therefore, binding on this Court under 28 U.S.C. § 2254(d) unless Mitchell can "establish by convincing evidence that the factual determination by the state court was erroneous." 28 U.S.C. § 2254(d).

[20] Mitchell has proffered no such evidence. He has filed depositions purporting to establish that Mr. Miller did not, as the state court found, actually interview all the possible witnesses in the case. The depositions do not, in fact, establish this fact, or even indicate it in a manner sufficient to warrant the substitution of a different version of facts four years after the first habeas corpus hearing and seven years after the crime.

[21, 22] In this circuit the constitutional standard for effective assistance of counsel is not errorless counsel or counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Spivey v. Zant*, 661 F.2d 464, 477 (5th Cir. 1981). This Court must inquire into the actual performance of counsel in conducting the defense, and a determination whether reasonably effective assistance was rendered must be based on the totality of the circumstances and the entire record. *U. S. v. Gray*, 565 F.2d 881, 887 (5th Cir. 1978), *cert. denied*, 435 U.S. 996, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). A review of the record evidence, Miller's testimony at the Tattnall County hearing and his deposition, show, even independent of the superior court judge's conclusions, that Miller rendered Mitchell assistance well within the parameters of the constitution. Even assuming the truth of Mitchell's allegation that Miller did not interview all the witnesses (a conclusion which the record does not support), does not necessarily show ineffective assistance. Miller need only have investigated the case to the point where he was familiar with the facts and the state's case. He appears without doubt to have done at least this much. Mitchell is silent on why his counsel should have done more. He shows no defense which might have been established and no other way in which his case was prejudiced. Absent some showing of prejudice, this claim even if true, cannot stand. *See Davis v. Alabama*, 596 F.2d 1214, 1221–23 (5th Cir. 1979), *judgment vacated*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980).

This discussion concerns the guilt/innocence phase of Mitchell's trial. While the petition alleges ineffective assistance in the sentencing phase as well, the findings of the state court do not discuss the action of Miller during the sentencing hearing. It is for this Court, then, to make an independent finding regarding the assistance rendered during this last phase of Mitchell's conviction. This will be accomplished in a later order.

2) Justification for Capital Punishment

Mitchell alleges the theoretical justifications for capital punishment are groundless and irrational and that because the penalty

fails to serve any rational or legitimate social interests, the harshness of the sentence makes it excessive. Imposition of a capital sentence, thus, would violate the Eighth Amendment prohibition of cruel and unusual punishment. In support of this proposition, the petition alleges that public sentiment is "not so strong as to require or justify use of the death penalty," that executions do not have an identifiable deterrent effect, that executions induce violence, and that life sentences serve penalogical purposes better than death sentences.

As noted above, several hearings have been held for the purpose of determining what evidence it would be necessary or unnecessary to hear in order to resolve the legal questions raised. No mention of the issue is made in the state court findings of fact or in the Georgia Supreme Court opinions in the case, either on direct appeal or on appeal from the denial of habeas corpus relief.[12] No evidence was proffered in support of this allegation in this Court either. In fact, neither party even mentioned it.

[33] This default could well be interpreted as an abandonment of the issue, but it is not necessary to so rule.

> [The Courts] may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Gregg v. Georgia, 428 U.S. at 175, 96 S.Ct. at 2926 (Opinion of Stewart, Powell and Stevens, JJ.). Suffice it to say Mitchell has not carried this burden here.

[34] The Court will opine further, however, that the issue has been legally foreclosed on several fronts. Noting that "[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law," 428 U.S. at 183, 96 S.Ct. at 2929, *citing Furman v. Georgia*, 408 U.S. at 308, 92 S.Ct. at 2761 (Stewart, J.), the concurring Justices cited above instruct that retribution is not a constitutionally forbidden purpose for exacting this punishment, and is not "inconsistent with our respect for the dignity of men." *Id. See also Roberts v. Louisiana*, 428 U.S. 325 at 337, 96 S.Ct. 3001 at 3007, 49 L.Ed.2d 974 (White, J., dissenting).

Both the propriety of retribution as a justification for the death penalty and the effectiveness of a deterrent effect are the subjects of an old and heated debate. The proper forum for this debate, however, is not properly in the courts of this country but in the chambers of the legislatures. As the Court noted in *Gregg*, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be death." 428 U.S. at 184, 96 S.Ct. at 2930 (footnote omitted). With regard to deterrence, Justice Stewart further opined in that case:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

428 U.S. at 186, 96 S.Ct. at 2931.

In short, this Court should be more than chary of substituting its own judgment for that of the Georgia legislature. It certainly cannot attempt this hubristic task in an evidentiary vacuum. Relief must be denied on this issue.

3) Imposition of the Death Penalty in Mitchell's Case

Mitchell alleges that the death penalty is excessive in his case in light of all the relevant mitigating factors relating to the offense and the petitioner. In support of this, Mitchell has made an offer of proof to

12. The issue was raised, however. See Respondent's Ex. 2, p. 2.

include evidence to show he had a good character, was a civic leader, that he was well educated, and lacked a criminal record.

[25] The Georgia Supreme Court considered whether the sentence of death was disproportionate in its review on direct appeal as mandated by Georgia Code Annotated § 27-2537. *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900. Of course, in its consideration that Court did not have benefit of any of petitioner's proffered evidence, as the defense rested at the sentencing hearing without the presentation of any evidence. This strategy is the subject of Mitchell's attack on the competence of his counsel, discussed above. This Court's determination of the question, however, must be made on the same record available to the Georgia Supreme Court.[13]

[26] The Georgia Supreme Court made the findings of fact contained in its opinion, some of which have been recited in an earlier section of this order. With this knowledge of the crime, that court then examined Georgia precedent and made a factual determination that the death penalty was not excessive or disproportionate to the penalty imposed in cases involving similar crimes. *Mitchell v. State*, 234 Ga. at 163, 214 S.E.2d 900.

This conclusion is binding upon this Court unless it is shown to be deficient under 28 U.S.C. § 2254(d). The sixteen cases relied upon by the Georgia Supreme Court to make the determination are listed in an appendix to the opinion. These cases have been reviewed in this Court. It is the determination of this Court that the "evidence" of these cases fairly supports the conclusion of the Georgia Supreme Court that the sentence of death is not [illegible] tionate or excessive with regard to Mitchell's crime. No other impediment imposed by section 2254(d) is evident. This Court, then, must accept the conclusion of the Georgia Supreme Court, and by so doing must deny relief on this ground.

4) Admission of Statements, Illegal Arrest

Mitchell complains that two statements given to police at the time of his arrest were extracted from him unconstitutionally, and their admission into evidence invalidated his sentencing hearing. The coercion and duress he alleges were used to extract the statements are accompanied by allegations of an illegal arrest and insufficient warrant as well.

[27] Significantly, Mitchell does not anywhere allege that his guilty plea was involuntary. The conclusion of the state courts that he was rendered competent assistance of counsel at the initial stages of his conviction, and the evidence which required that conclusion, will allow no other conclusion but that Mitchell entered his plea of guilty with a full informed knowledge of the nature and consequences of his act. By so doing, he waived any objection to non-jurisdictional constitutional deprivations which occurred prior to his plea. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). He is thus foreclosed from raising these issues here.

Additionally, with regard to the statements, the state habeas court found that Mitchell's allegations that the statements were coerced were not credible. This credi-

13. The logic of this proposition is obvious. While the additional evidence petitioner wishes had been presented at sentencing affects his claim of ineffective counsel, which could require at least partial relief, it is not relevant to the determination of whether the Georgia Supreme Court fulfilled its statutory duty imposed by section 27-2537. That duty cannot be performed except upon the record before that Court, and this Court's review must, accordingly, be so restricted as well.

The Court will note, however, that consideration of evidence now before it in examining this issue is not necessarily beneficial to Mitchell. While he would have introduced evidence of good character, etc., there is also countervailing evidence before this Court which only reinforces the conclusion of the state courts. Specifically, the court notes that according to Clarence Miller, Mitchell displayed the unrepentant rebellious personality of a self-labeled "black sheep," who claimed responsibility for numerous other robberies and killings aside from the one he accomplished and the three he attempted in the case at bar.

bility determination is asserted to be incorrect by the petitioner. However, none of the evidence he has proffered has or could convincingly demonstrate this error sufficiently to dispell the presumption of correctness imposed by section 2254(d).

Relief must be denied on this ground as well.

B. *Willie X. Ross*

Ross has four allegations remaining. They are: 1) that the denial of his motion for a change of venue denied him a fair trial; 2) the use of perjured testimony denied him a fair trial; 3) the death penalty is disproportionate in this case; and 4) the insufficiency of justification for the death penalty.

1) Change of Venue

[28] A criminal defendant certainly has a right to be tried by an impartial jury. An impartial and indifferent jury, however, need not have been totally ignorant of the facts and issues involved:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Once a juror has assured that he can set aside any preconceptions about the case, it becomes the petitioner's burden to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.*

[29] A petitioner must show that the setting of the trial was inherently prejudicial, or that the jury selection process of which he complains permits an inference of actual prejudice in order to prove a violation of his right to an impartial jury which rises to a constitutional level. *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589 (1975). He must demonstrate an actual and identifiable prejudice on the part of jury members attributable to publicity. *Mayola v. Alabama*, 623 F.2d 992, 996 (5th Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981), or that community prejudice actually infected the jury box. *Bronstein v. Wainwright*, 646 F.2d 1048, 1051 (5th Cir. 1981).

This Court's independent review of the record, *Bronstein v. Wainwright*, 646 F.2d at 1051, requires the conclusion that Ross has not carried this burden. The evidence before the Court does not support the allegation that the atmosphere at the time of the trial in any way prevented Mr. Ross from the measured and impartial judicial proceeding to which he had a right.

[30] The *voir dire* revealed that almost every juror had heard or read accounts of the case. There is no question that the case received much publicity. This is not in itself unusual for a venire from a small, largely rural community where violent events such as the one in which Ross participated are not at all usual. However, of the sixty odd jurors who were interviewed, relatively few [16] answered that they had a preconceived opinion about the case based upon the pretrial publicity, and of these only three affirmed that they could not set this opinion aside and judge the case on the evidence presented in court alone. These jurors were excused for cause. *Voir Dire* Tr. pp. 23, 55, 60. Also, it is significant that most of the jurors were asked whether they felt any pressure from the community to return a conviction or whether a verdict of not guilty would cause repercussions upon the jurors' business or community life. Only one indicated in the affirmative; he was excused for cause. *Voir Dire* Tr. pp. 115–16. These facts do not indicate the trial was conducted in an atmosphere which affected the petitioner's trial in any significant way. Ross proffered evidence, depos-

16. The Court counts six.

tions of local media representatives, and attached exhibits of newspaper stories, does not alter this conclusion. It demonstrates at most that extensive coverage of the case occurred, not that an atmosphere of hysteria or prejudice against Ross existed, and certainly not that any community "atmosphere" infected the trial or jury. Further, the evidence makes no showing of actual prejudice to Ross caused by the publicity. Given these facts, the Court finds that the trial court was well within its discretion in denying petitioner's motion for a change of venue.

The petitioner cannot prevail on this issue.

2) Use of Perjured Testimony

[31] Ross claims the prosecution suborned the perjured testimony of his brother by the combined use of threats, promises and rewards. Ross' brother, Theodore Ross, testified against him at trial to the effect Ross had remarked to Theodore that he had shot a policeman during the shootout. Theodore recanted this testimony at the state habeas hearing, asserting he had been promised a light sentence and sexual relations with his wife in jail in return for the perjured testimony against his brother.

This evidence was presented for consideration to the judge of the Superior Court of Tattnall County, Georgia, at Ross' habeas corpus hearing. That court rejected Theodore's version as not credible. (Habeas order, p. 9). The credibility determination made by Judge Caswell appears reliable, and since Ross has not provided this Court with any indication of the reverse, 28 U.S.C. § 2254(d) requires this Court to accept that determination.

Relief must be denied on this issue.

3) Excessiveness of Death Sentence

[32] Ross alleges the execution of his death sentence would inflict an excessive penalty in his case in consideration of all the relevant factors relating to the offense and the petitioner. In support of this he alleges, essentially in mitigation of his crime, that he has no significant criminal record, he is a high school graduate and has a good character, that others involved received lesser sentences, that it was not clear that Ross had actually shot the victim, and that officer Meredith provoked his own death by shooting at Ross.

This evidence is not relevant to this Court's duty. Ross had the opportunity to present this at the sentencing phase of his trial. He elected not to do so. Trial Tr., p. C-18. He has not alleged, either in state court or here, that his counsel was ineffective in this election. This Court's duty, then, is not to determine directly whether the death sentence is excessive with regard to Ross, it is rather to determine whether the Georgia Supreme Court fulfilled the statutory duty assigned by section 27-2537 in such a way as to make the presumption of correctness imposed by section 2254(d) binding. On direct appeal, of course, the Georgia Supreme Court determined the sentence was not excessive. (See the similar discussion with regard to Mitchell above.)

Petitioner's discussion on the applicability of section 2254(d) has not been extensive. Little evidence has, in fact, been offered in support of the mitigating circumstances alleged above, and no argument on how it applies under section 2254(d). The Court can surmise, however, that the argument would be that either condition number 3 or 8 is invoked, viz that the evidence would show that the material facts have not been adequately developed in the state courts, or that the record does not fairly support the determination of the Supreme Court. None of the other six apply.

Absent a claim of ineffective assistance of counsel, Ross cannot now claim the material facts were not adequately developed because the evidence he wants this Court to consider was not presented at the sentencing phase of his trial; the obvious interpretation of this trial strategy is that Ross and his counsel were satisfied that the material facts were adequately developed, and that they wished the Georgia Supreme Court to consider the record as it was.

[33] It is this record, then, which this Court must consider to determine, under section 2254(d)(8), if the finding of fact made by the Georgia Supreme Court, that the death penalty as imposed on Ross was not excessive, is fairly supported by the record. This Court's determination, based upon the record and the cases cited by the Georgia Supreme Court in its appendix to the opinion, *Ross v. State*, 250 Ga. 381 at 389, 211 S.E.2d 354, is that the record fairly supports that court's conclusion.

4) *Justification for the Death Penalty*

Ross raises the allegation that there is not sociological or penalogical justification for the death penalty. It is the same issue treated above for petitioner Mitchell. That treatment applies here. No relief can be granted on this issue.

C. *James Lee Spencer*

Spencer raises two additional issues. Both relate to instructions given to the jury, and both are alleged to have denied him his right to be proven guilty beyond a reasonable doubt as to each element of the crime. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). In particular, he objects to instructions which he alleges shifted the burden of proof to him in a hearing on a special plea of insanity, and in the final instructions to the jury at trial.

1) *The Special Plea*

At the end of Spencer's special plea of insanity, the trial judge gave the following instruction:

> Now this is, in effect, a civil action which you must decide, and the burden of proof is upon James Lee Spencer to prove his case by what is known as a preponderance of the evidence.

Special Plea Tr., p. 38. Spencer alleges this language violated his rights under *In re Winship*, *supra*, and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

[34] His reliance upon these cases is misplaced. While he correctly notes that a defendant has a right, protected by the constitution to be tried only when he is competent to understand the proceeding and assist in his defense, *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980), *Winship* and *Sandstrom* do not require the extrapolation of this right that the petitioner requests. These cases only require the state to shoulder the entire burden of *proof* beyond a reasonable doubt of "every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1072. The purpose of Spencer's "insanity" hearing was not to determine his state *of mind* at the time of the crime; it was to determine his competence to stand trial. Spencer claimed to have amnesia at the time *of* trial. Spencer's state of mind at trial is not an element of any crime with which he was charged, nor probative of any fact necessary to prove or defend against any of these crimes.

The instruction given was a correct statement of Georgia law. *Wallace v. The State*, 248 Ga. 255, 282 S.E.2d 328 (1981), which does not offend the Constitution. *Cf. Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (Requirement that defendant prove affirmative defense to murder of "extreme emotional disturbance" does not unconstitutionally shift burden of proof when actual elements of crime charged not affected).

2) *The Presumption of Murder*

Spencer challenges as unconstitutional two charges given to his jury during the guilt/innocence phase of his trial. The jury was charged about reconciliation of testimony:

> I further charge you, members of the jury, that the law directs that it is your duty where it can be done to so reconcile conflicting evidence, if there be such evidence indicated, as to make all the witnesses speak the truth, so that perjury will be imputed to none of them. But if the evidence in the case is of such irreconcilable conflict that this cannot be done, you will accept that evidence most reasonable and credible to you.

Trial Tr., p. 799. And the jury was charged on presumptions:[15]

> I charge you that when the state's evidence shows the commission of a homicide by the accused by the use of a deadly weapon, the law presumes murder.

Trial Tr., p. 806.

[35] Spencer alleges that the first instruction lessened the burden of the state to prove every element of the offense beyond a reasonable doubt by informing the jury that, if at all possible, they could ignore reasonable doubt that might develop because of conflicts in evidence. This argument has no merit. The instruction merely informs the jurors to construe inconsistent evidence against an implication of perjury if possible. It cannot be interpreted to direct or control a juror's entertainment of a reasonable doubt; it expressly directs that irreconcilable conflicts must be resolved according to what is "reasonable and credible" to each juror. The charge does not affect the burden of proof.

[36] The second charge does. *Sandstrom v. Montana* involved a jury charge which could reasonably be interpreted as either a conclusive presumption, an irrebuttable direction by the Court to find an element once certain facts are proved, or as a burden-shifting instruction, one which directs a certain finding unless rebutted by the defendant. 442 U.S. at 517, 99 S.Ct. at 2455. *Sandstrom* found both to be in violation of the precept expressed in *Winship*. While Spencer's jury, unlike David Sandstrom's, was charged that all presumptions may be rebutted, Trial Tr., p. 797, that charge occurred at a different place in the charge than the instruction that the law presumes murder upon proof of a homicide committed with a deadly weapon. This charge is of precisely the sort proscribed in *Sandstrom*. As in *Sandstrom*, this defect is not removed by detailed and careful instruction elsewhere that the state must prove each element beyond a reasonable doubt, that the defendant is presumed innocent until proven guilty, etc. 442 U.S. at 518 n.7, 99 S.Ct. at 2456 n.7.

[37, 38] The investigation here must turn to whether this error was harmless. Spencer cites *Hammontree v. Phelps*, 605 F.2d 1371, 1380 (5th Cir. 1979) for the proposition that such an error can never be harmless. While one of the headnotes does state this, the case itself does not. In fact, the *Sandstrom* court left this question open. 442 U.S. at 526–27, 99 S.Ct. at 2460. *See Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). This Court opines that the error here may be treated as harmless. *See, e.g., Milton v. Wainwright*, 407 U.S. 371, 372–73, 92 S.Ct. 2174, 2175, 33 L.Ed.2d 1 (1972) (Constitutional error held harmless in light of overwhelming evidence of guilt); *Mason v. Balcom*, 669 F.2d 222, 225 (5th Cir. 1982) (Court recognized that a burden-shifting charge might be harmless given appropriate circumstances such as overwhelming evidence of guilt.).

The defective charge instructs on what is necessary to prove the crime of murder. The jury was also charged, according to Georgia law, that:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances show an abandoned and malignant heart. A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Trial Tr., p. 806; *see* Ga.Code Ann. § 26-1101. Before constitutional error can be held harmless it must be shown to be harmless

15. In a brief filed at the direction of the Court May 14, 1981, Spencer attempts to include other charges on presumptions in his challenge here. Since these were not presented to the courts of Georgia or included in the actual petition to which the state is basing its response, this Court will ignore the additions as surplusage.

the March 22, 1983, telephone conversation included all of the information alleged by plaintiff, the alternative scheme proposed (to have Chemical Waste utilize ENSCO or Rollins' Annex I Incinerator if the Vulcanus were not available) would violate the IFB. According to plaintiff's version of events, it has never provided a letter of intent/commitment from Rollins or ENSCO. And further, if such a relationship were documented, it would violate the IFB's clear instructions that wastes must be transported directly from the Chem-Dyne Site to the final disposal facility and that the bidder assume sole responsibility to ensure that the wastes are in fact promptly disposed of at that location. The agreement between Aqua-Tech and Chemical Waste, and their representations as to the alternative plan for use of ENSCO or Rollins, reveal that the wastes were to be transported "to the permitted storage facility at . . . Emelle, Alabama." However, the IFB required that wastes be directly and promptly disposed of at the final disposal site. These requirements are not mere technicalities, but important contract specifications designed to avoid unnecessary risks in the clean-up of the Chem-Dyne Site.

Aside from the lack of merit, the equities presented weigh heavily against the plaintiff's protest and request for relief. The public interest in ensuring prompt removal of the wastes prior to the onset of winter temperatures militates strongly against any court-imposed delay of the clean-up activities. Based upon proffers and representations of counsel made at the final hearing, the cost advantage offered by Aqua-Tech's bid has undoubtedly been diminished. O.H. Materials has made substantial expenditures in implementing the contract since issuance of the notice to proceed on April 27, 1983. Thus, it is doubtful the public or the government would benefit from termination of the O.H. Materials contract. The various interests therefore weigh against termination of the present contract. *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C.Cir.1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir. 1958).

For the reasons stated above the Court concludes that the plaintiff's bid protest challenge should be rejected. An appropriate Order will be entered.

William "Billy" MITCHELL, Petitioner,

v.

Joe S. HOPPER, Warden, Respondent.

Civ. A. No. 678-132.

United States District Court, S.D. Georgia, Savannah Division.

June 7, 1983.

State prisoner petitioned for habeas corpus, alleging denial of effective assistance of counsel at the sentencing phase of his trial. The District Court, Bowen, J., held that defendant was not denied effective assistance of counsel at sentencing phase of trial, notwithstanding counsel's failure to interview officer involved in taking of defendant's confession, failure to call lay mitigation witnesses, failure to obtain psychological evaluation of defendant, misconception as to law on admissibility of prior convictions, reliance on strict construction of statutory requirement of notice of aggravating circumstances, and failure to seek advice or assistance of other attorneys before conducting defendant's trial.

Denied.

1. Criminal Law ⇐641.13(7)

In assessing defense counsel's conduct at sentencing phase of trial, court had to view counsel's actions in context of information reasonably available to attorney at time of trial. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(7)

Defendant was not entitled to perfect counsel at sentencing phase of trial but only to counsel reasonably likely to render and rendering reasonably effective assistance given totality of circumstances. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(7)

Defendant was not denied effective assistance of counsel at sentencing phase of trial, notwithstanding counsel's failure to interview officer involved in taking of defendant's confessions, failure to call lay mitigation witnesses, failure to obtain psychological evaluation of defendant, misconception as to law on admissibility of prior convictions, reliance on strict construction of statutory requirement of notice of aggravating circumstances, and failure to seek advice or assistance of other attorneys before conducting defendant's trial. U.S.C.A. Const.Amend. 6; O.C.G.A. §§ 17-10-2, 17-10-30(b)(2); Ga.Code, § 27-2503.

4. Criminal Law ⇐641.13(7)

There is no per se requirement that evidence in mitigation be presented.

Bobby L. Hill, Savannah, Ga., James S. Liebman, John C. Boger, New York City, for petitioner.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent.

ORDER

BOWEN, District Judge.

In a memorandum and opinion dated April 1, 1982, this Court ruled on all of the issues raised in petitioner's petition except petitioner's claim that he was denied effective assistance of counsel at the sentencing phase of his trial. In that memorandum and opinion this Court noted that the findings of the state habeas court, but not all of those the actions of petitioner's attorney in relation to petitioner's sentencing hearing. Accordingly, this Court held an evidentiary hearing on May 18, 1982, solely on the issue of the effectiveness of petitioner's counsel at the sentencing phase. After careful consideration, I find that petitioner's final claim must fail.[1]

The standards under which petitioner's claim of ineffective assistance of counsel at the sentencing phase must be evaluated were explicated in the *en banc* opinion in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir.1982) (Unit B *en banc*). Under the court's analysis in *Washington v. Strickland*, a petitioner has the initial burden of showing two elements. First

> [a]s a threshold requirement, he must show that his counsel was in fact ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 3570, 77 L.Ed.2d — (1983). This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner [then] has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" in his case.

Stanley v. Zant, 697 F.2d 955, 958 (11th Cir.1983). Since I conclude that petitioner's

1. The petitioner argues in his reply memorandum filed February 17, 1983, that *Washington v. Strickland*, 693 F.2d 1243 (5th Cir.1982) (Unit B *en banc*) entitles him to an additional evidentiary hearing. At this Court's hearing on May 18, 1982, I was fully apprised of the type and quantity of mitigation evidence which petitioner claims Mr. Miller should have offered. So that the Court of Appeals can also assess the mitigation evidence proffered by the petitioner, the petitioner's motion to expand the record to include some twenty-four affidavits is hereby granted. I see no need for additional testimony.

trial counsel was not ineffective. I need not address the issue of prejudice.

[1, 2] In *Washington v. Strickland*, the court identified five major lines of cases involving the scope of an attorney's duty to conduct pretrial investigation. The parties to the present case agree that this case fits into the fourth category of cases discussed by the court in *Washington v. Strickland*, the category in which counsel fails to conduct a substantial investigation into all lines of defense and claims his decision to channel resources into fewer than all plausible lines of defense was based on a strategic choice. The court in *Washington v. Strickland* found that in such cases an attorney "is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable." 693 F.2d at 1256. Put another way, "when counsel's assumptions are reasonable given the totality of the circumstances and counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 1255. In order to assess the effectiveness of petitioner's trial attorney, Mr. Clarence A. Miller, it is necessary to understand the totality of the circumstances surrounding Mr. Miller's decisions and to identify the strategies which he formulated in light of those circumstances.[2]

In assessing Mr. Miller's conduct, it must be noted at the outset that the job with which he was faced was not an easy one. While an attorney may not throw up his hands and abrogate the duty of effective representation that he owes to his client, I cannot ignore the fact that in some cases there is simply very little that an attorney, as a practical matter, can do for his client. I find that the range of choices open to Mr. Miller in this case was limited by two significant factors. First, it is clear from the record that the evidence against the petitioner was overwhelming. Mr. Miller summarized his predicament when asked at petitioner's state habeas corpus hearing why he had not insisted on a hearing into the voluntariness of petitioner's confessions:[3]

> A. For several reasons, one of which is I had followed the case from the day or so after Mr. Mitchell's arrest. I had observed his positive identification by two eye witnesses in a line-up. I had seen the confession. I had interviewed practically all of the State's witnesses. I had access both to the confessions and the Crime Lab's reports. I had seen the two weapons involved, the identification ballistics wise of the two bullets taken from the deceased, matched with the gun, the monies which were the fruits of the robbery which were identified and that coupled with the fact that Mr. Mitchell also freely told me the same things that were in the confession.

(H.T. pp. 17-18). Not only did petitioner freely admit to Mr. Miller that he had mur-

2. In assessing Mr. Miller's conduct, the Court must view his actions in the context of the information which was reasonably available to Mr. Miller at the time of petitioner's trial. Years of retrospective scrutiny will almost always lead to the discovery of flaws in the performances of even the best attorneys. It must be recognized, however, that petitioner was not entitled to perfect counsel but only to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir.1982) (Unit B en banc).

3. A review of Herbert Carr's deposition shows that the signature on the Sylvester Police Department waiver of rights form was indeed Herbert Carr's signature. Mr. Carr simply couldn't remember being present before his regular shift after the passage of many years. Assuming that Herbert Carr did not sign the waiver of rights form at 10:30 A.M. on August 11, 1974, it should be noted that petitioner gave a subsequent confession to the Worth County Sheriff's office. There is no reason to suspect that this subsequent confession was tainted in any manner by the alleged irregularity in the confession involving Herbert Carr. I note that the Superior Court of Tattnall County and this Court have both determined that both confessions were voluntary. Mr. Miller specifically inquired into the presence of any coercion in regard to petitioner's first confession on cross-examination at petitioner's sentencing hearing and objected to the admission of that confession on voluntariness grounds. His objection was overruled.

dered Christopher Carr, shot Mrs. Carr, and forcefully taken money from the convenience store where the Carrs worked, he also supplied Mr. Miller with the details of a number of other murders that he had been involved in. (H.T. p. 29; *Miller depo.* pp. 43–44). Mr. Miller was faced with the eyewitness testimony of a mother who had witnessed the brutal murder of her son and who had been shot repeatedly and unmercifully herself. Mr. Miller knew Mrs. Carr "was going to be there as a witness, taking off a wig, showing a shaved skull with scars from depressions in the skull from bullet holes in it. . . ." (Fed.T. p. 41). I find that Mr. Miller thoroughly investigated the events surrounding petitioner's arrest and subsequent confessions. Since Mr. Miller's relationship with the Worth County Sheriff's Department and City of Sylvester Police did not amount "to a cat and mouse game," (*Miller depo.* p. 42) he had every reason to believe that the officers he interviewed had given him honest, forthright answers.

Second, Mr. Miller's role was limited by the fact that petitioner was capable of playing and did in fact play a major part in making crucial decisions relating to his defense. In his deposition taken on December 4, 1978, Mr. Miller referred to petitioner as follows: "He appeared to me very intelligent, and his communication skills were just superior to me. My total impression was that he was as smart as I was." (*Miller depo.* 44). When asked if he considered asserting an insanity defense, Mr. Miller responded:

> A. No, I did not, because I've had a great deal of study and experience in psychology and adolescent psychology in connection with my master's program and the work with public education, and I'm certainly not a degree psychologist or psychiatrist, but I feel that my ability to evaluate is probably quite good for mental disorders, and nothing about his demeanor, appearance, conversations, philosophy or anything else seemed irrational in way [sic] to me.

(*Miller depo.* 45). I find that Mr. Miller fully advised petitioner of the alternative courses of action open to him and that petitioner chose to plead guilty and to not testify during his sentencing hearing.[6] I further find that petitioner discouraged Mr. Miller from pursuing the possibility of presenting character witnesses at the sentencing phase of petitioner's trial. (*see* Fed.T. pp. 33–34). These choices made by the petitioner severely impaired Mr. Miller's ability to defend the petitioner.

Despite the difficulty of his position, I find that Mr. Miller formulated a number of strategies of defense. First, before petitioner chose to plead guilty, Mr. Miller encouraged petitioner to testify in his own defense. Although Mr. Miller thought petitioner was one of contempt for the judicial process and that he wouldn't really bother to soil his hands with participating in it. (H.T. pp. 31–32).

At this Court's hearing Mr. Miller testified:

> Now the—my belief that Mr. Mitchell did not want to testify at either phase, and that my conclusion was Mr. Mitchell did not go to a jury trial and changed his plea because of his decision not to take the stand, on the guilt phase. That either for the same reasons or some other reasons, he didn't wish to testify period.

(Fed.T. p. 38). I find that petitioner made his decision not to take the stand based largely on his fear that he "might slip or divulge information that would incriminate the people who were with him" (Fed.T. p. 41) at the time of Christopher Carr's murder and during the commission of other crimes.

6. At petitioner's state habeas corpus hearing, Mr. Miller gave his assessments of why petitioner decided to plead guilty:

> Now whether there was one or a collection of several things, uh, that were primary factors in drawing him to that conclusion I cannot even say what they were and I don't know if he ever articulated one or two or three reasons for himself. I concluded from my discussions with him that among his reasons were: One, tending to deny the guilt of the fellows who were with him [sic] an effort to take the larger share of the blame or responsibility with a view toward lightening their role; two, that he did not believe there was any great likelihood that he would . . . that the death sentence would ever be executed against him also in any event. I think those were . . . were two of the conclusions that I drew; uh, together with another one that his attitude and demeanor at that time was al-

former would probably be convicted, it was Mr. Miller's opinion "that with his [petitioner's] communication skills he could portray enough to keep him from getting the death sentence." (Fed.T. p. 10). This strategy was foreclosed when petitioner chose to plead guilty and to not take the stand even during the sentencing phase of his trial. After petitioner changed his plea to guilty and it was apparent that the state had not given written notice of aggravating circumstances "prior to trial", Mr. Miller decided to rely on a legal argument based on Ga. Code Ann. § 27-2503 (Harrison 1978), Official Code of Ga.Ann. § 17-10-2 (Michie 1982). My review of Georgia law indicates that the necessity of written notice of aggravating circumstances was an unsettled issue of Georgia law and that although the argument ultimately failed, the argument was not unreasonable when made. *See Bowden v. Zant*, 244 Ga. 280, 260 S.E.2d 465 (1979); *Potts v. State*, 241 Ga. 67, 93–94, 243 S.E.2d 510 (1978); *Howell v. State*, 238 Ga. 578, 234 S.E.2d 497 (1976). *Gates v. State*, 229 Ga. 796, 194 S.E.2d 412 (1972), which is cited by petitioner as authority for the proposition that it was clearly established in 1974 that written notice of statutory aggravating circumstances was not necessary, was decided under the old sentencing statute and dealt with prior convictions not notice of statutory aggravating circumstances. As part of his ultimate sentencing phase strategy, Mr. Miller also raised objections to the state's evidence of aggravating circumstances.[5] Specifically, Mr. Miller objected to the admission of state's Exhibit Number One, the confession taken by members of the Sylvester Police Department, after cross-examining Chief Tommy Marchman of that department concerning the voluntariness of that confession. Mr. Miller also objected to the identification of petitioner by Mrs. James Carr. Both objections were overruled. In addition to trying to exclude the state's evidence in aggravation, Mr. Miller stressed, in closing argument, petitioner's cooperation with the police [illegible] any formal evidence of petitioner having committed any other crimes.

[3] Having identified Mr. Miller's strategies and outlined the circumstances which limited the choices open to Mr. Miller, I will now address specifically the arguments raised by petitioner through counsel to support a finding of ineffective assistance of counsel at the sentencing phase of petitioner's trial. First petitioner argues that Mr. Miller was ineffective in that he failed to interview key aggravation witnesses and to investigate or move to suppress key evidence in aggravation. I find, as did Judge Caswell in his order denying petitioner state habeas corpus relief, that Mr. Miller fully investigated the facts surrounding the murder of Christopher Carr. I specifically find that any failure of Mr. Miller to interview Herbert Carr was not unreasonable under the circumstances. Mr. Miller interviewed all of the other officers involved in taking petitioner's confessions and had no reason to suspect that Herbert Carr's testimony would add anything to or contradict the testimony of other witnesses. I also find that Mr. Miller was fully aware of the testimony that Mrs. Carr would offer and that it was reasonable to assume that there was no way that he could exclude her testimony. Mr. Miller's objections to her testimony at the sentencing phase of petitioner's trial were indeed overruled.

[4] Second, petitioner raises Mr. Miller's failure to interview mitigation witnesses and to present evidence in mitigation. In this regard, it must be recognized that there is no *per se* requirement that evidence in mitigation be presented. *Stanley v. Zant*, 697 F.2d 955 (11th Cir.1983). I find that Mr. Miller questioned petitioner extensively concerning his background in an effort to probe the possibility of presenting mitigation witnesses. (Fed.T. pp. 33–34). Mr. Miller had every reason to believe that petitioner was being candid with him and

5. The state was attempting to show that the murder of Christopher Carr occurred while petitioner was engaged in the commission of another capital felony, armed robbery, and while he was engaged in the commission of the offense of aggravated battery on Mrs. Carr. *See* Official Code of Ga.Ann. § 17-10-30(b)(2) (Michie 1982).

Mr. Miller, therefore, was able to accurately assess the type of mitigation evidence that was available. As I noted earlier, petitioner discouraged Mr. Miller from calling witnesses and the decision not to call such witnesses was made by the petitioner. To the extent that petitioner's decision was based upon Mr. Miller's advice to the effect that anything petitioner could bring forward in terms of mitigation witnesses would be outweighed by the fact of petitioner's previous conviction for attempted robbery and the circumstances surrounding the murder of Christopher Carr, I find Mr. Miller's advice to have been entirely reasonable under the circumstances. Mr. Miller was thoroughly familiar with the trial judge and reasonably could have concluded that testimony from petitioner's family, friends, teachers, counselors, coaches, and minister stating that the Billy Mitchell they knew at some time prior to the crime for which he was being sentenced was not the kind of person who could have committed that crime would not have been helpful or might even have been counter-productive. I also find that Mr. Miller could have reasonably concluded that any attempt on his part to explain away petitioner's prior conviction would have been useless or could have drawn undue attention to that conviction. It should be noted that the state did not submit evidence of petitioner's previous conviction and that Mr. Miller was able to utilize their failure to submit proof of any prior conviction in his closing argument. Although it is clear that the state could have submitted the prior sentence into evidence regardless of Mr. Miller's decision not to offer any evidence at the sentencing phase of petitioner's trial, I find it was reasonable for Mr. Miller to believe that the sentence would not be offered unless he opened the door for such rebuttal evidence. See, Stanley v. Zant, 697 F.2d 955, 965 (11th Cir.1983).

In addition to arguing that Mr. Miller should have called by mitigation witnesses, petitioner asserts that Mr. Miller should have examined petitioner's psychiatric records and considered the possibility of a psychological evaluation of petitioner. At this Court's hearing on May 18, 1992, Mr. Miller was asked whether he had considered a mental examination of Mr. Mitchell. He responded:

> Well, only possibly fleetingly in connection with my evaluation of him, his demeanor, his behavior, every impression he made on me totally negatived any possibility in my mind that he had any irrational streaks, or any unusual manifestations of anything that I could recognize. I was totally persuaded that he was a rational person, he was an intelligent person, that he had good communication skills. And, I saw nothing from my own discussions meetings with him to suggest that any evaluation by psychiatrists could have any bearing on the case.

(Fed.T. p. 13).

As noted previously in this order, Mr. Miller had some background in psychology and found Mr. Mitchell to be totally rational and fully capable of participating in his defense. As Mr. Miller noted in his deposition, "one may adopt a premise that anybody who is willing to kill somebody else is mentally deranged." (Miller depo. at 95). This Court, however, is unwilling to adopt the premise that a psychological evaluation is required in every death penalty case. Mr. Miller had ample opportunity to assess petitioner's state of mind, and I find that Mr. Miller's conclusion that further investigation into petitioner's mental state would be fruitless was entirely reasonable under the circumstances.

Third, petitioner argues that Mr. Miller's representation was ineffective because he failed to research the law. Specifically, petitioner cites Mr. Miller's failure to research the clear statutory law regarding the admissibility of prior convictions in capital sentencing trials in Georgia. The petitioner points to Mr. Miller's statements at this Court's hearing on May 18, 1992, which indicate that it was his understanding that the prior conviction could not have been presented if Mr. Mitchell had not taken the stand or if, as actually occurred, the defense put on no evidence at all. (Fed.T. pp. 36, 60). As petitioner notes, these conclusions

were incorrect. Mr. Miller's statements must, however, be taken in context and evaluated in light of his strategy at the sentencing phase. Mr. Miller's position was that since the state had not given him proper notice prior to trial of statutory aggravating circumstances, that no evidence of such circumstances could be offered. The issue of petitioner's prior conviction was irrelevant to Mr. Miller's argument. As Mr. Miller put it: "I had no concern about that. If you did away with the statutory aggravating circumstance his sentence was automatic, life imprisonment. I didn't care whether it came in, for that purpose." (Fed.T. p. 57). Mr. Miller's following testimony is also extremely significant:

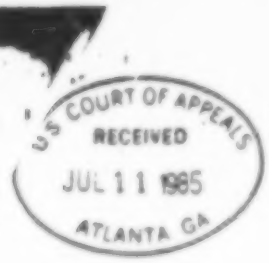
> Q. Was there any doubt in your mind that the District Attorney would have tendered that into evidence if you had put evidence of Mr. Mitchell's character in?
>
> A. I certainly believe that he would. And, I don't have any reason to doubt that he would.
>
> Q. And, you did not put Mr. Mitchell on the stand and it was not introduced into evidence. Is that correct?
>
> A. That is my recollection. I believe that is correct. However, I would go a step further and say this: that had Mr. Mitchell told me he wanted to address the Court, I would not have asked him not to, even in face of that document. (Fed.T. p. 61).

I find that any misconception that Mr. Miller had concerning the law on the admissibility of prior convictions did not affect petitioner's decision not to take the stand. The record shows that Mr. Miller vigorously encouraged petitioner to testify on his own behalf. I also find that any misconception that Mr. Miller had did not affect the decision to call no mitigation witnesses. As I noted earlier, these witnesses were not called as the result of a choice made by the petitioner. Moreover, Mr. Miller's opinion that any mitigation character evidence that he could have mustered would have been neutralized by petitioner's prior sentence was not unreasonable under the circumstances of this case.

Petitioner also cites Mr. Miller's failure to research the clear statutory law regarding the requirement of actual—but not written—notice of aggravating circumstances. As I have previously noted, the law of Georgia was not clear on this point at the time of petitioner's trial. Given the language of Ga.Code Ann. § 27-2503 (Harrison 1978), Official Code of Ga. 17-10-2 (Michie 1982)[6] and the state of Georgia law in 1974, I cannot find that Mr. Miller's reliance on a strict construction of the statutory notice requirement amounted to ineffective assistance. "[T]actical decisions do not render assistance ineffective simply because in retrospect it is apparent that counsel chose the wrong course." *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir.1981); *see Beckham v. Wainwright*, 639 F.2d 262, 265 (5th Cir. 1981). Under the circumstances, Mr. Miller's plan to raise the technical issue at trial and to pursue it vigorously on appeal was entirely reasonable.

6. The relevant language is as follows:

> (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas, provided that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the district attorney, as provided by law, regarding the punishment to be imposed. The district attorney shall open and the defendant or his counsel shall conclude the argument. Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. (emphasis supplied)
>
> Ga.Code Ann. § 27-2503 (Harrison 1978); Official Code of Ga. 17-10-2 (Michie 1982)



IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

US COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
1985
Spencer D Mercer
Clerk

No. 83-8649

WILLIAM "BILLY" MITCHELL,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 23, 1985, 11 Cir., 198_, _____F.2d_____).

(July 11, 1985)

Before RONEY, FAY and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the Judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney

United States Circuit Judge

REHG-6

APPENDIX D

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

SPENCER D. MERCER
CLERK

September 11, 1985

Mr. James S. Liebman
Attorney at Law
99 Hudson Street
New York, NY 10013

Mr. Michael L. Rugen
Attorney at Law
44 Montgomery Street
San Francisco, CA 94104

No. 83-8649 - WILLIAM BILLY MITCHELL v. KEMP
(DC No. CV-478-132)

MANDATE STAYED TO AND INCLUDING October 1, 1985

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

SPENCER D. MERCER, CLERK

By: Angela L. Bickers ALB
Deputy Clerk

Encls.

cc: Ms. Susan V. Boleyn.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8649

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 1 1985
SPENCER D. MERCER
CLERK

WILLIAM "Billy" MITCHELL,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,

Respondent-Appellee.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Georgia

- - - - - - - - - - - - -

O R D E R :

( ) The motion of appellant, William "Billy" Mitchell, for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(xxx) The motion of appellant, William "Billy" Mitchell, for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 1, 1985, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ PAUL H. RONEY

UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)